No. 2983

In the United States Circuit Court of Appeals

For the Ninth Circuit

F. B. MACOMBER,
Plaintiff in Error,

vs.

J. O. GOLDTHWAITE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

VEAZIE & VEAZIE,
Attorneys for Defendant in Error.

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OPENING STATEMENT.

The opening statement of the plaintiff in error fails to state the issues of fact which were presented by the pleadings, and in the place of the facts as found by the Court and as they are shown by the evidence it puts forward as the facts of the case the ill founded and unsupported theories of plaintiff's counsel respecting several important points, in par-

ticular as to the supposed effect of the Crittenden agreement and as to what the consideration for the notes was. We, therefore, deem it necessary to make an additional opening statement, and to point out some of the errors in the one submitted by the plaintiff.

This is an action at law brought in the District Court for Oregon by the plaintiff, a citizen and resident of California, against the defendant, who was when the case was begun a citizen and resident of Oregon, to recover balances claimed to be due on ten promisory notes, each for $5000, alleged to have been given by the defendant to the plaintiff on March 1, 1922. The answer admits that notes in the form set forth were made by defendant, but denies that same were made or delivered except as in the answer affirmatively alleged, and denies each and every allegation of the amended complaint respecting the making of the notes except as affirmatively alleged in the answer. In his affirmative answer the defendant states as follows:

That at the time the notes were given and for a long time prior thereto, plaintiff was president and one of the principal stockholders of the Macomber-Savidge Lumber Company, and defendant was president and principal stockholder of the Modoc Lumber Company; that the latter company had become indebted to the former company in an amount around $50,000; that both companies were financially embarrassed, the Macomber - Savidge

Lumber Company having assigned its property to a trustee named Sanborn for the benefit of certain of its creditors, and the Modoc Lumber Company's creditors having placed their claims in the hands of the Board of Trade of San Francisco; that the Modoc Lumber Company was endeavoring to refinance its affairs by obtaining new capital through a first mortgage loan of $250,000, and by inducing all its creditors to place their claims in the hands of the Board of Trade and to grant an extension of time, the payment thereof to be secured by a second mortgage; that the prospective first mortgage lender required that the second mortgage should not exceed a certain specified sum; that the amount of the indebtedness of the Modoc Lumber Company to the Macomber - Savidge Lumber Company was in dispute; that in order to keep the second mortgage within the limit required, it was necessary that the claim of the Macomber-Savidge Lumber Company to be included therein should not exceed $54,000; that to obtain this concession the Modoc Lumber Company and the defendant on the one part agreed with the Macomber-Savidge Lumber Company and the plaintiff on the other part, that the Macomber - Savidge Lumber Company should present and assign its claim to the Board of Trade of San Francisco for inclusion in the second mortgage or other form of funded indebtedness in the amount of only $53,905.92, and that in consideration thereof the Modoc Lumber Company should approve the claim of the Macomber-Savidge

Lumber Company as stated by it, and in addition thereto that the defendant should guarantee the payment of part of said claim, to-wit: to the amount of $50,000, by giving the promissory notes described in the amended complaint, on the understanding that the portion of said claim turned over to the Board of Trade of San Francisco should be converted into notes or other evidence of indebtedness, signed by the Modoc Lumber Company and its subsidiary corporation, the Williamson River Logging Company, and secured by a second mortgage, or some form of lien on the properties of the two companies; and that any and all payments made on any part of said indebtedness of the Modoc Lumber Company should be credited against the said personal notes to be given by the defendant as a guaranty, up to the amount of defendant's said notes; that said ten promissory notes described in the amended complaint were each and all made, given and delivered by the defendant, and taken, accepted and received by the plaintiff, for the use and benefit of and as agent for the Macomber-Savidge Lumber Company, solely on the consideration aforesaid, and on the agreement and understanding between the parties to said notes, had and entered into at the same time the notes were given, that defendant should thereby become bound as surety and guarantor for the Modoc Lumber Company up to the amount of $50,000 for the payment of said indebtedness then existing and owing from the last named company, ~~and~~ to the Macomber-Savidge

Lumber Company, as above set forth, and not otherwise; that the said contemplated arrangement was carried out; that the claim of the Macomber-Savidge Lumber Company in the reduced amount of $53,905.92 was assigned to the Board of Trade and converted into notes secured by a second mortgage; that these notes were afterwards sold by the Board of Trade and later were paid off in full; and that thereby the defendant has been discharged from liability on the notes sued on, which were collateral to the said indebtedness of the Modoc Lumber Company.

The case was tried by the Court without a jury, on written stipulation of the parties. The Court below found the facts to be substantially as alleged in the answer (Transcript, p. 61), and gave judgment for defendant. The case is brought here on writ of error by the plaintiff.

No request or motion was made by the plaintiff in the court below for any findings of fact, either general or special, nor was any point of law submitted by plaintiff for the ruling of the court, save by certain objections to testimony, which will be discussed later. No exceptions were taken to any of the findings of fact or conclusions of law as made. No question is raised on this appeal as to the sufficiency of the facts found to sustain the judgment. The assignments of error, with the exception of two or three respecting admission of testimony, are based on matters to which no ex-

ceptions were taken in the lower court, and which this court therefore has no jurisdiction to consider.

We call attention now to certain details in which the statement of facts made by the plaintiff in his brief needs correction. A labored effort is evident therein to have it appear that the plaintiff had ceased, on and after the 14th of December, 1921, the date of the Crittenden agreement, to act as president and director of the Macomber-Savidge Lumber Company. The purpose of this is to escape from the presumption that in taking security related to a debt due his company, the plaintiff acted in the company's interest and not in his own personal interest, and also to escape from the rule that an officer of a corporation can not bargain away his company's rights for a consideration personal to himself. The court is therefore told by the plaintiff in the first sentence of his opening statement that the plaintiff "up to the 14th day of December, 1921, was president and director of the Macomber-Savidge Lumber Company", and a large part of the brief is devoted to the nursing of the idea that because of the Crittenden agreement the plaintiff could not after the 14th of December, 1921, take any action for the protection of the interests of his corporation, but that he could and did bargain away those interests for his own personal benefit.

It is admitted in the pleadings, being alleged in paragraph I of the answer to the amended complaint (Transcript, p. 28) and not denied in the re-

ply thereto (Transcript, p. 40) that at the time of all the transactions involved in this action, the plaintiff was the president of the Macomber-Savidge Lumber Company. It is undisputable that the plaintiff did go on doing business for his corporation and acting as its president long after the 14th day of December, 1921. The lower court has found (Transcript, p. 51), not only that the plaintiff was president of his company at all times mentioned in the pleadings, but that he acted in behalf of his company in this very transaction, and no exception has been taken by plaintiff to this finding. The evidence that plaintiff continued to act on behalf of his corporation as its president and managing officer up until long after the execution of the notes in question is abundant and is uncontradicted except by some feeble pretensions on his part that he conducted himself according to the terms of the Crittenden agreement. Inasmuch as the fact has been found in our favor on this point by the lower court, and is not here for review, we refrain from discussing in detail the evidence in relation thereto.

It is also repeatedly stated in plaintiff's brief that the notes in question were given to plaintiff in consideration of his own individual consent to the reduction of his company's claim and the filing of same with the Board of Trade. This statement is not only contrary to the findings of the lower court (Findings VI and VII, Transcript, pp. 64-66) to which no exceptions were taken, but is contrary to the evidence and absurd on its face. We do not

deem it necessary or proper to discuss the evidence in detail. It suffices to say that nobody—not even the plaintiff himself—so testified.

The plaintiff is largely staking this appeal on the theory that the Crittenden agreement completely barred him from acting on his company's behalf in respect to any of its affairs. The Macomber-Savidge Lumber Company was not a party to that agreement, which was merely a private arrangement between the stockholders. The company made no transfer of its assets to Crittenden, and he never became vested with any title thereto. The Crittenden agreement was cancelled and superseded by a new agreement to which the corporation was a party (Defendant's Exhibit No. 12, Transcript, pp. 326, 330) on February 21, 1922. The new agreement was not and did not purport to be a continuation of the Crittenden agreement, but completely superseded same. The provision contained in the Crittenden agreement forbidding the compromising of any claims without the written consent of Macomber and Savidge is not contained in the Sanborn assignment. Even if it were therein, it would have no such effect as is contended for by plaintiff, but would render it more rather than less obligatory on him to represent faithfully the interests of his company, inasmuch as it designated him as one of the two officers and directors who were to supervise the liquidation of its affairs through the trustee.

It is assumed all through plaintiff's statement

of the case that Goldthwaite was dealing with Macomber on the basis of the Crittenden agreement, although Goldthwaite has testified (p. 212) that he knew nothing of its terms, and the Crittenden agreement had been annulled at the time the dealings took place.

We shall show hereafter in this brief that if the notes were given for Macomber's individual benefit and the consideration was what he claims it was, they were void for illegality of consideration.

Before taking up the assignments of error on the merits excepting in an incidental way, we propose now to show by a preliminary discussion thereof that none of them, outside of the first, second and fourth assignments, are founded on any exceptions taken below; and these three are stuffed with matter which does not come under the objections and exceptions on which they rest. The plaintiff in error has therefore no substantial basis for the review he is seeking to obtain, unless it can be found in that part of assignments numbered I, II and IV which legitimately comes under the exceptions on which these three assignments rest.

PRELIMINARY DISCUSSION OF THE ASSIGNMENTS OF ERROR.

The first assignment is founded on the action of the court, as shown in the bill of exceptions at page 120 of the transcript, reference to which will show that the objection and exception cover just

one specific question, namely, whether immediately before the notes sued on were signed, there was any argument between plaintiff and defendant, or difference, as to whether the Macomber-Savidge Lumber Company would put its claim into the hands of the Board of Trade or not. The court permitted the question to be answered, reserving a ruling on the objection until after the evidence was in. No motion to strike or other later effort to obtain a ruling is shown. Plaintiff in fact appears to have evaded that particular question and never answered it. His counsel in their assignment based thereon have run into the record matter testified to in answer to other questions which were not objected to and which did not refer to any conversations between the parties and were not in any sense within the scope of the objection. Such loose and general exceptions and assignments of error based thereon are insufficient to secure a review of the action of the lower court. Questions of law, which were not presented to the lower court and sharply called to its attention by exceptions properly preserved in the record, are not open to review, and an exception which is too general and indefinite to challenge the attention of the trial court to any specific question of law involved in the case will not invoke the exercise of the appellate jurisdiction. Highway Trailer Co. v. City of Des Moines, Iowa, 298 Fed. Rep. 71. Wear v. Imperial Window Glass Co., 224 Fed. Rep. 60. An objection and exception on a specific point do not give a party carte blanche to

go into the entire record and assign as coming thereunder everything he may select.

The second assignment of error is founded on what appears in the bill of exceptions at page 145 of the transcript. The only answer called for by the question objected to was whether at the time plaintiff and defendant had the negotiations which led, among other things, to the adjustment of the account between their respective corporations, the plaintiff raised any question as to whether he was then acting for his corporation or for himself personally. The plaintiff, in assigning error on the overruling of his objection to the question, has attempted to run in under the objection extraneous matter not testified to in response to that question and pertaining to entirely different subjects. The same situation exists respecting several of the other assignments of error. As a matter of course, assignments of error must be based on exceptions taken to rulings at the trial. Ritz Carlton Restaurant & Hotel Co. v. Gillespie, 1 Fed. Rep. (2d) 921. Borderland Coal Sales Co. v. Imperial Coal Sales Co., 7 Fed. Rep. (2d) 116. Texas Co. v. Brilliant Mfg. Co., 2 Fed. Rep. (2d) 1. Northwest Theatres Co. vs. Hanson, 4 Fed. Rep. (2d) 471. An assignment of error to the ruling of the trial court does not dispense with the necessity of an exception. Goldfarb v. Keener, 263 Fed. Rep. 356. Under U. S. Stat. Sec. 700, the Circuit Court of Appeals is without jurisdiction to review rulings made on trial of an action of law by the court, unless they were

excepted to at the time. U. S. Shipping Board Emergency Fleet Corp. v. Drew, 288 Fed. Rep. 374. We will not extend our brief with further citations on a point so elementary and well settled.

The question, objection, ruling and answer, as shown at pp. 145-149, are as follows:

> Q. At the meeting when you agreed to approve the account on behalf of your company, was Mr. Macomber making any question as to whether he represented his company or himself personally?
>
> MR. VAN DUYN: We object as incompetent, irrelevant and immaterial, and as parol testimony intended to vary an agreement which was reduced to writing.
>
> COURT: It will be admitted subject to that objection.
>
> MR. VAN DUYN: May we have an exception to questions of like kind, as I understand it—the same ruling and exception?
>
> COURT: Yes.
>
> A. Will you give me the question?
>
> Q. (Question read.)
>
> A. There was no such question.

The testimony called for was competent, relevant and material and had not the slightest tendency to vary the written agreement. The plaintiff was endeavoring to maintain the position in the lower court, as he is attempting to do here, that when he had the transactions with defendant which resulted in the giving of the notes in question, he,

the plaintiff, was not acting on behalf of the Macomber-Savidge Lumber Co. but was acting only on behalf of himself individually. The answer alleged, in paragraphs VI and VII (Transcript, pp. 32 and 33) that plaintiff in said transaction acted on behalf of his company. These allegations were denied in paragraphs VI and VII of the reply (Transcript, pp. 47-49). Plaintiff had further alleged affirmatively in the reply that the Macomber-Savidge Lumber Company did not make any agreement whatsoever with the Modoc Lumber Company or the defendant at said time. When on the stand as a witness on his own behalf at the opening of the trial, plaintiff had testified (Transcript, p. 114) that the indebtedness of the Macomber-Savidge Lumber Company mentioned in Exhibit B, was the indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company that existed on the date the notes were signed, and that at the same time plaintiff came to some agreement concerning the amount of that indebtedness with Mr. Goldthwaite on behalf of plaintiff's company. After making this statement, he had endeavored to back up on the matter by saying:

> I did not represent my company officially; I represented myself alone; nobody represented the company in making the agreement. My company did not come to any adjustment with the Modoc Lumber Company as to the amount of the account at this time. The arrangement that was made was not an agreement between

> the two companies at all. At the time I presume I was president of the Macomber-Savidge Lumber Company, but I don't know whether I was or not.

He then went on to set up the claim that the Crittenden agreement barred him from doing any business on behalf of his company, though he had to admit doing a number of specific acts on its behalf when confronted with writings and other evidence. Plaintiff had put the Crittenden agreement in evidence as an exhibit (Plaintiff's Exhibit 11, Transcript p. 127) and, as shown at page 134 of the transcript, his counsel had called attention to the provision therein that none of the parties to the agreement should transact any business on behalf of the corporation, and plaintiff had testified that he had conducted himself in accordance therewith. Surely the defendant had a right to dispute this testimony and to testify on the same point. We grant that the position of the plaintiff was so absurd as scarcely to need any evidence to contradict it, when he said that in obtaining a written approval of his company's account (Defendant's Exhibit B, Transcript, p. 113) he did not act on behalf of his company but represented himself only and that no one acted on behalf of his company. The natural presumption of Mr. Goldthwaite or any one else in negotiating such a settlement of the account would be that the president of each company was acting on behalf of his company and assuming to have authority to do so. Under such circumstances, if

plaintiff desired to disclaim authority to bind his company, it was the plain duty to put the other side on notice and to say that he had no authority and was merely acting on his own behalf. The question put to Mr. Goldthwaite and objected to by plaintiff was intended to elicit Mr. Goldthwaite's testimony as to whether the plaintiff had at the said time raised any question as to whether he was acting for his corporation or for himself personally, and the answer was that he had not. We think we are justified in saying that there was no merit in the objection ~~even if there had been an exception to the ruling.~~

The third assignment of error is founded on the action of the court appearing in the bill of exceptions at page 152 of the transcript. It is to be noted that no exception was taken to the ruling. Indeed, plaintiff did not even ask for or obtain a ruling, let alone an exception. The question objected to was a question put to defendant as to whether at the time the notes were signed, defendant had any dicussion with plaintiff concerning them. Plaintiff asked the court that the evidence called for should be considered as objected to, on the ground that same tended to vary the written contract, and the court assented. There is no suggestion of an exception. In the case of Felton v. Newport, 92 Fed. Rep. 470, it was held that an assignment of error will not lie upon the admission of testimony, unless the ruling is excepted to; and that where evidence is admitted subject to

objection made, and no exception is taken at the time, the matter must be again called up and a final ruling obtained, and an exception taken thereto. This holding is squarely in point and what has been said above in the discussion of the second assignment of error respecting the necessity of an exception to the ruling if it is to be assigned as error, also applies here.

Even if there had been a ruling and an exception, we are satisfied it would be held by the court that the objection was without merit. We will discuss the point later.

The action of the court on which the fourth assignment is founded appears in the bill of exceptions at page 153 of the transcript. Just prior to the putting of the question which was objected to, the defendant had testified that at the time the notes were presented for his signature, he protested that they should run to the Macomber-Savidge Lumber Company, because the indebtedness was to that company, and that in response thereto, plaintiff had said he was having trouble with his associates and was distrustful of the assignee and that he desired if possible to have the notes in his own name, in case any trouble arose in the future, so that he would have the whip hand or dominate the situation within his own company; and that he, defendant, did not owe plaintiff personally any money and plaintiff had never loaned him any money. With the foregoing as a preface, and with the written

contract, Defendant's Exhibit B, in evidence, in which it was stipulated that any payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company were to be credited on the notes of Goldthwaite to Macomber, the following took place, forming the basis of plaintiff's fourth assignment of error, as set forth in the Transcript at p. 153:

> Q. Was there any other consideration given to you for the execution of these notes than you have set forth in your answer?
>
> MR. VAN DUYN: No failure of consideration pleaded at all.
>
> MR. VEAZIE: We pleaded exactly what the consideration was, and I simply asked him if there was any other consideration.
>
> A. None whatever; no, sir.
>
> MR. VAN DUYN: Objected to upon the ground that it has not been pleaded in the answer or further defense of the defendant, and varies the contract.
>
> COURT: Admitted subject to that objection and exception.
>
> Q. Under these circumstances you then signed the notes which are in evidence.
>
> A. Yes.

The objection that what was alleged in the answer was not pleaded is too nonsensical to discuss. We will comment later on the contention that proof of the consideration is to be excluded because it varies the written contract.

The fifth assignment is not founded on any particular objections and exceptions not already covered by preceding assignments. Much of the matter referred to therein as alleged error was brought out by the plaintiff's own counsel on cross examination of the defendant, as shown at pages 206 to 230 of the transcript. It is a sham assignment, founded on no objection, ruling of the court or exception, unless a part of it finds support in the same matter covered by assignment number IV. It requires no separate discussion.

The sixth assignment is not founded on any objection or exception. No such exception as counsel have imagined in drawing up this assignment, either to the testimony of Mr. Goldthwaite or of Mr. Brainard, as to the transactions had before the Board of Trade, or as to the evidence showing the payment of the notes and mortgages was ever interposed. The testimony on these points all came in without any objection thereto, and much of it in response to cross-examination by plaintiff's counsel. This assignment may therefore be eliminated from further consideration.

The seventh assignment is a blanket one, alleging error of the court in stating the law of the case as set forth in the written opinion. No exception thereto was taken. Even if an exception had been noted, it is settled law that assignments of error cannot be based on the opinion of the court below.

Stoffregen v. Moore, 271 Fed. Rep. 680.
Gibson v. Luther, 196 Fed. Rep. 203.

Fleischmann Const. Co. v. U. S., 270 U. S. 349, 46 S. Ct. 284.

In addition to the above good reasons why this assignment of error should be disregarded, we expect to show, in the discussion which will follow, that the view of the lower court as to the law, set forth in the opinion, is correct.

The eighth assignment is not founded on anything in the bill of exceptions, but is based on the contention that there is no evidence in the record to establish the facts set forth in the sixth finding of fact made by the lower court. As we have remarked above, the plaintiff made no request or motion for any findings, general or special, and took no exceptions to the findings which were made. Our contention is that he is not entitled to present for review here any question respecting the sufficiency of the evidence to sustain the findings which the court did make. In the case of H. F. Dangberg Land & Livestock Co. v. Day, 247 Fed. Rep. 477, the Court held that where, at the close of the testimony in an action tried to the Court, plaintiff made no request for a finding in its favor on the issues, and by no motion or request presented the question of law whether there was substantial evidence to sustain findings for defendant, the sufficiency of the evidence can not be reviewed on appeal.

In the case of Pabst Brewing Company v. E. Clemens Horst Co., 264 Fed. Rep. 909, the Court held that the sufficiency of the evidence to support

the trial court's findings is not open to review in the Circuit Court of Appeals, where there was no request for a contrary finding, and no motion or request presenting to the trial court the question of law whether there was substantial evidence to sustain the finding.

In the case of Security National Bank of Sioux City, Iowa, v. Old National Bank of Battle Creek, Mich., 241 Fed. Rep. 1, the Court said that the question whether there was any substantial evidence to sustain the findings, which is the only question as to the relation of the evidence to the findings reviewable by a Federal Appellate Court, can be reviewed only when, by motion, objection, or request for a declaration of law, or some like action, it was presented to and decided by the trial court,, and an exception to the ruling taken and allowed.

In the case of Highway Trailer Co. v. City of Des Moines, 298 Fed. Rep. 71, the Court held that in an action at law tried to the Court the question of law whether there is any substantial evidence to sustain a finding is reviewable only when a request or a motion is made, denied and exception taken, or some other like action is taken which fairly presents that question to the trial court, and secures its ruling thereon during the trial.

In the case of Fleischmann Const. Co. v. U. S., 270 U. S. 356, 46 S. Ct. 288, the court said:

> "To obtain a review by an appellate court of the conclusions of law, a party must either ob-

tain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. Norris v. Jackson, supra, 129; Martinton v. Fairbanks, supra, 673 (5 S. Ct. 321). That is, as was said in Humphreys v. Third National Bank, supra, 855 (21 C. C. A. 542), "he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of the law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits."

Scores of additional cases could be cited to the same effect if it were deemed necessary.

Since the question as to whether there is any evidence to sustain finding number VI is not really before the Court, we are not disposed to burden the record with any extended reference to the testimony to show that the assignment would be without merit if the question were really here for consideration. Inasmuch as the plaintiff in error has discussed his three assignments numbered VIII to X inclusive collectively under point three of his brief, we will take them up in the same manner

later on and say what we think necessary respecting the evidence to sustain them.

The ninth assignment is in the same situation as the eighth, being based on finding number VII. It likewise rests on no ruling of the lower court, objection or exception.

The tenth assignment is in the same situation, being based on finding No. XV and not founded on any exception.

The eleventh assignment is based on the failure of the lower court to make a certain finding, to which plaintiff says he was entitled because of the allegations contained in paragraph V of the reply. The allegations of fact contained in paragraph V of the reply respecting the Crittenden assignment are immaterial, inasmuch as it appears therefrom that he had resigned and had been superseded by a new trustee before the notes in question were given. The matter alleged in assignment number XI as to the effect of the Crittenden agreement in depriving plaintiff of power to represent his company is not contained in the reply and is a mere illfounded conclusion of law. No motion or request was presented to the lower court to find these facts or draw the conclusion therefrom now contended for. The assignment therefore has no foundation in any exception or ruling. Even if there had been a special application to the court to make such a finding, compliance therewith would have been discretionary and a refusal would have constituted no reversible

error, granting that the finding was proper. Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. Rep. 366. Calaf v. Fernandez, 239 Fed. Rep. 795. U. S. v. Atchison T. & S. F. Ry. Co., 270 Fed. Rep. 1.

Counsel for plaintiff in error appear to be laboring under the idea that the practice in regard to findings and exceptions in the Federal Court is governed by the conformity statute, which is not so. Bank of Waterproof v. Fidelity & Dep. Co., 299 Fed. Rep. 478. Goldfarb v. Keener, 263 Fed. Rep. 356.

The twelfth assignment refers solely to the court's conclusions of law, and is not founded on any exception. In the case of Arkansas Anthracite Coal & Land Co. v. Stokes, 277 Fed. Rep. 625, it was held that where defendant made no request for findings or for any declaration of law in his favor, and saved no exception and took no other step prior to rendition of the judgment, the question of law as to the sufficiency of the evidence to sustain the findings is not open to review; it being too late, after the rendition of the judgment, to take exception to rulings of the court on the issues tried.

The thirteenth assignment is a blanket assignment founded on no exception and alleging error of the court in giving judgment for defendant. Even if there had been such an exception, it has been often held that it would present no question for review.

In the case of Arkansas Anthracite Coal & Land Co. v. Stokes, 277 Fed. Rep. 625, it was held that a general assignment that there was error in rendering judgment one way or the other is too indefinite for consideration on appeal.

In the case of Pennsylvania Casualty Co. v. Whiteway, 210 Fed. Rep. 783, it was held that where an action at law is tried to the court and a jury is waived, the court's general finding stands as the verdict of a jury and may not be reviewed, unless the lack of evidence to sustain the finding has been suggested by a ruling thereon or a motion for judgment, or some motion to present to the court the issue of law so involved before the close of the trial.

In the case of National Surety Co. v. United States, 200 Fed. Rep., 142, it was held that in the absence of any request to find a fact specially or to find generally for defendant, and a ruling thereon, and an exception taken, a general finding for plaintiff stands as the verdict of a jury, and an exception thereto presents no question for review.

In the case of Phoenix Securities Co. v. Dittmar, 224 Fed. Rep. 892, it was held that under Act March 3, 1865, c 86 Sec. 4, 13 Stat. 501, (Rev. St. Secs. 649, 700,—Comp. St. 1913, Secs. 1587, 1668) providing that the court's finding on the facts, where the case is submitted to it by written consent to waive a jury, shall have the effect of a verdict, and its rulings during the trial, excepted to at the time, may be reviewed, if presented by bill of exceptions, and

if the finding is special the sufficiency of the facts found to support the judgment may be reviewed, the general finding in such a case is not reviewable, except where there is no evidence to support it, and then only when the question was expressly presented to the trial court and exception saved to its ruling thereon.

In the case of Keeley v. Ophir Hill Consol. Mining Co., 169 Fed. Rep. 398, 601 (two cases), it was held that an assignment that there was no evidence to support the judgment presents a question of law which cannot be reviewed unless presented to and passed on by the trial court by some appropriate action before the end of the trial.

In the case of Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co., 205 Fed. Rep. 147, it was held that where the parties to an action at law waive a jury and submit the issues of fact to the court, the court's general finding thereon cannot be reviewed; but questions sought to be reviewed must be presented to the trial court by requests for findings or declarations of law applicable to the evidence.

In the case of Calaf v. Fernandez, 239 Fed. Rep. 795, it was held that where, in such case, no request was made during the trial for special findings, nor any motion for a general finding in favor of the adverse party, there is no question in respect to the general finding that can be reviewed by an appellate court under Rev. St. Sec. 700 (Comp. St. 1915, Sec.

1668), which provides for a review in such case only of "the rulings of the court in the progress of the trial."

In the case of Bank of Waterproof v. Fidelity & Deposit Co. of Md., 299 Fed. Rep. 478, it was held that to secure review of evidence by appellate court in trial by court without jury under written stipulation waiving jury, appellant must have moved for judgment and excepted to court's refusal thereof; exception to judgment alone not presenting anything for review.

In the case of Granite Falls Bank v. Keyes, 277 Fed. Rep. 796, it was held that on trial of an action at law to the court, where no finding or ruling was asked on the conclusion of the evidence, assignments that the court erred in directing judgment for one party and in not directing judgment for the other present no question for review under Rev. St. Sec. 700 (Comp. St. Sec. 1668.)

In the case of United States v. Atchison T. & S. F. Ry. Co., 270 Fed. Rep. 1, it was held that general specifications that the court erred in entering judgment for defendant, or in failing to enter it for plaintiff, upon specified counts, but setting forth no specific issues of law or rulings thereon excepted to, which conditioned the entries or refusals to enter, are too indefinite for review.

In the case of United States Shipping Board Emergency Fleet Corporation v. Drew, 288 Fed. Rep. 374, it was held that assignments that the

court erred in rendering judgment for plaintiff and in not rendering judgment for defendant are too general to raise any question for review.

ANSWER TO ARGUMENT OF PLAINTIFF RESPECTING ASSIGNMENTS NUMBERED I TO VI INCLUSIVE:

We have shown by our analysis above that only the first, second and fourth assignments rests on any exceptions taken in the court below. As to the first assignment, we have shown that it rests on an exception and objection to a question which was not answered, and that the court had reserved a ruling until after the evidence was in, and was never called on to rule. For the reasons set forth in our said analysis, we contend that no substantial question is presented to the court by said assignment. The intent of the question objected to, as was stated to the court at the time, was merely to show the circumstances under which the notes and the written agreement, defendant's Ex. B, were executed and the situation of the subject matter and the parties; all of which matters it is expressly provided in Section 717 Oregon Laws may be shown. That section reads as follows:

> For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in

the position of those whose language he is to interpret.

This rule, about which there can be no controversy, entitled us to the admission of all of the evidence we put in respecting the circumstances surrounding the making of the notes. There were before the court for consideration the notes and the written agreement executed simultaneously therewith. To enable the court to interpret these instruments, we were entitled to show everything this section of the code says we may show. This embraced, of course, the relations between the parties and the companies they respectively represented, the facts as to the indebtedness, the dispute concerning the amount thereof and the adjustment they were making at the time, the arrangement contemplated with the Board of Trade—all these matters being expressly referred to in the writings themselves. It seems to us, that in a case like this, the rule cited is broad enough to admit also proof of what the actual consideration for the notes was, because the other matters we are plainly entitled to bring out thereunder can hardly be shown without bringing out the consideration for the notes at the same time.

At any rate, this section of the statute clearly entitled us to prove all the circumstances and relations of the parties existing at the time the notes and the agreement (Defendant's Exhibit B) executed simultaneously therewith were made.

The only testimony the plaintiff gave which can be deemed to have any relation to the question objected to was his statement as follows, appearing at page 121 of the Transcript:

> A. * * * I did not consent to the claim of the Macomber-Savidge Lumber Company being filed with the Board of Trade until after we had concluded our agreements and Goldthwaite had handed me the ten notes.
>
> Q. Wasn't it a part of the understanding that you would consent when the notes were signed?
>
> A. Yes, sir, that was the understanding. I consented for myself.

Plaintiff's counsel are hardly in a position to urge that this testimony is matter not proper for the consideration of the court, inasmuch as they have set out the same matter, tinged with their theory as to its interpretation, at pages 6 and 7 of their brief. If there was any error in the reception of the testimony—we think it is clear there was none—it would be cured by the admissions of plaintiff's counsel, made in their brief, respecting the facts.

The fourth assignment presents a more substantial question. Indeed, it appears to be the only assignment in the whole record which presents any real issue for the consideration of the court. The interrogatory objected to called for and elicited testimony as to what was the consideration for the notes.

Inasmuch as the uniform negotiable instruments law is, and was at the time of the transactions here involved, in effect in both Oregon and California, there is no question of conflict of laws on that subject; but as to matters of practice, such as the form of the pleadings and the reception of evidence, the laws of Oregon govern, as a matter of course.

Counsel for plaintiff are in grievous error in saying to the Court that the only defense pleaded is that the notes were given as collateral security to the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, and were discharged by the payment thereof. That is one defense. Another defense is that if the notes really were given to the plaintiff for his personal benefit, as he alleges in his reply, they were void because the consideration therefor was illegal, they having admittedly been given in consideration of concessions made by him for and on behalf of the corporation of which he was president and a director. A third defense is that by the terms of the writing, Defendant's Exhibit B, as it must be constructed in the light of the situation of the parties and the subject matter, **Mr. Goldthwaite has been exonerated from liability on his notes by the payment which was made of $53,905.92 and interest on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, assigned by the latter company to Sanborn, and by him to the Board of Trade, and by the latter to the Menefee Investment Com-**

pany. We think that the plain meaning of the writing is, that all payments on that indebtedness were to be credited against the notes, and it is not controverted that the payment which was made in July, 1925, was a payment **pro tanto** of that debt. This defense was set up in the answer, and it was proved by the introduction of the written agreement of the parties, with the evidence of the circumstances necessary for the interpretation thereof. As to this defense, it does not matter whether the notes were given for the personal benefit of the plaintiff or that of the corporation, or whether they were collateral security or primary obligations—it was expressly agreed between the parties that they were to be credited with all payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, and it is conceded that payments have been made on that debt to an amount sufficient to wipe out the Goldthwaite notes.

The writing, Defendant's Exhibit B, copied at page 8 of the plaintiff's brief, constitutes in large part the proof of our first defense, which is that the notes were collateral security only; and it is the main substance of our third defense, which is, that no matter whether the notes were collateral security or not, they were to be credited with all payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company; it being admitted that payments in excess of the amount of the notes have been made.

The contention of plaintiff is that the promissory notes and the writing, Defendant's Exhibit B, are absolutely complete agreements, so perfect and clear, so definite in respect to consideration and every other element and circumstance, that the defendant was not even entitled to show in respect thereto what the code of Oregon in Section 717 expressly provides that every party to a litigation may show respecting every agreement.

The defendant on the other hand contends that the notes themselves tell nothing as to what the actual consideration was, and that the writing, Plaintiff's Exhibit B, is very far from being a complete and formal document, embodying the full expressions of the agreement of the parties, referring as it does on its face to a conversation and an oral agreement existing outside thereof, and to other matters in respect to which it can not be interpreted without proof of the circumstances surrounding its execution and explaining the relations of the parties to the subject matter. The very first thing referred to in defendant's Exhibit B is a conversation and a personal agreement in connection with the claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company. Inasmuch as a conversation is mentioned, it appears to refer to an oral agreement outside the writing, Defendant's Exhibit B, on which it is founded, in part at least. When inquiry was made, it immediately developed that such was the fact, and the brief of the plaintiff admits as much. Plaintiff

himself testified, as we have quoted his testimony above in our discussion of the first assignment of error, that it was part of the understanding when the notes were signed that he would consent to the claim of the Macomber-Savidge Lumber Company being filed with the Board of Trade. Defendant's testimony shows without dispute that the whole consideration for the giving of the notes was the agreement of Macomber on behalf of his Company to file its claim in a reduced amount with the Board of Trade, and to participate along with the other creditors in the plan for refinancing. Plaintiff's attorneys calmly adopted all this matter as part of the material facts of the case and set out on pages 6 to 8 of their brief. What we are trying to get at is this—the writing, Defendants Exhibit B, does not purport to be a complete embodyment of the agreement of the parties. It refers to a conversation and to some agreement already existing. It provides that Mr. Goldthwaite is to approve a certain claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company. To be of any effect, such approval would have to be an official act on behalf of his corporation. The writing does not say what that claim was. Oral proof was necessary to show that fact. The writing does not say that the claim was a disputed one. That is a material circumstance requiring parol proof to show it. What consideration was being given for the concession made by the Modoc Lumber Company in approving the disputed items of

the claim? The writing mentions none and parol proof was necessary to show what such consideration was. What has the San Francisco Board of Trade to do with the claim, and why are any payments to be made to that institution? The writing does not say. Oral evidence is necessary to show what its connection with the transaction is to be, and what the parties had agreed to in that respect. What "personal notes" are referred to in the writing? It does not say. Parol evidence was necessary to show. What was Macomber's relation to the Macomber-Savidge Lumber Company? The writing does not say. Parol evidence was necessary on that point and likewise as to Goldthwaite's relations to the Modoc Lumber Company. On page 7 of plaintiff's brief his counsel say that "defendant undertook negotiations with F. B. Macomber to obtain his consent to the trustees filing a claim * * * in the reduced amount of $53,000. Mr. Macomber, on February 28, 1922, agreed * * * to consent to the division and reduction of the claim and * * * to the filing by the trustee of proof of said claim in the sum of $53,000, if J. O. Goldthwaite, defendant in error, would approve the entire amount allowed by his company to Macomber-Savidge Lumber Company, and would personally give his individual ten notes to F. B. Macomber as an individual in the sum of $5000 each for obtaining the individual consent of Mr. Macomber to the loss to his individual interest, which would result because of the loss of the immediate right to proceed against the debtor,

because of the allowing the Menefee interests priority in security between the mortgages, and also because it would effectuate the giving up by the Macomber-Savidge Lumber Company of a right to have the balance of its claim, to wit, about $18,000.00, secured, postponing it to a third and inferior position and thus involving Macomber in an individual loss. This was agreed to by Mr. J. O. Goldthwaite, and the agreement so reached was reduced to writing, a copy of which agreement is as follows," and plaintiff's attorneys then proceded to set out the writing, Defendant's Exhibit B, which does not contain a single one of these terms which plaintiff's counsel say were part thereof, except the provision that defendant was to approve the amount of the claim of the Macomber-Savidge Lumber Company. Of course, we are not admitting that plaintiff's counsel are correct in stating that the consideration for the notes was the individual consent of Macomber and the individual loss he suffered. Nobody has so testified—not even plaintiff himself, and the Court has found otherwise. But the point is that it is evident on the face of the writing that it does not state all of the terms of the agreement of the parties, and in particular that it does not state the consideration for the giving of the notes; and plaintiff's counsel admit as much. This being so, parol evidence to supplement the writing was admissible.

In 22 C. J. at page 1283, the rule is stated as follows:

> Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing.

This rule is supported by the citation of hundreds of authorities, including decisions of this court. See also Contract Company v. Bridge Company, 29 Ore. 553.

The question presented by the fourth assignment of error is whether, under the law applicable to negotiable instruments and the general rules of evidence and practice in effect in the State of Oregon, the lower court erred in permitting the defendant to testify to what the consideration for the notes was. The first ground on which it is contended that the evidence was not admissible is that the question of consideration was not put in issue by the pleadings.

The amended complaint, in paragraph II of each cause of action, alleges that on the first day of March, 1922, defendant made his certain promissory note in writing in words and figures as follows, and then sets forth a copy of the note, containing therein the words "value received."

The answer of the defendant to this paragraph of the amended complaint, as to each of the ten separate causes of action, is as follows:

> Defendant admits that on or about the first day of March, 1922, he made a promissory note in form as alleged in paragraph II thereof; but denies that same was made or delivered except as hereinafter affirmatively alleged; and denies each and every allegation of said paragraph except as hereinafter affirmatively alleged.

Nor is the foregoing by any means the end of the matter. In paragraph III of each separate cause of action of the amended complaint it is alleged that the plaintiff is now the lawful owner and holder of the said promissory note. This allegation is denied in the answer thereto; which puts in issue the ownership of the notes; and under that issue the defendant is entitled, as the authorities abundantly show, to introduce his proof that the consideration for the notes did not proceed from the plaintiff.

In his affirmative answer the defendant has set the transaction out fully as to what the actual consideration was. After alleging the matters of inducement and setting forth fully the relations which existed between the Modoc Lumber Company and the Macomber - Savidge Lumber Company at the time the notes were given, the answer alleges:

> In order to keep the amount of the second mortgage or such form of funded indebtedness as might be agreed upon, down to the limit fixed by the said lender, it was necessary that the amount of the claim of the Macomber-Savidge Lumber Company to be included therein should not exceed $5[illegible],000.00 or thereabouts.

To obtain said concession, the Modoc Lumber Company and this defendant on the one part agreed with the Macomber-Savidge Lumber Company and the plaintiff herein on the other part, that the Macomber-Savidge Lumber Company, through its trustee, should present and assign its claim to the Board of Trade of San Francisco for inclusion in the second mortgage or other form of funded indebtedness in the amount of only $53,905.92, and that in consideration thereof the Modoc Lumber Company should approve the claim of the Macomber-Savidge Lumber Company as stated by it, in the amount of $68,164.83, and in addition thereto, that the defendant should guarantee the payment of part of the said claim, to wit, to the amount of $50,000, by giving the promissory notes described in the complaint and hereinafter mentioned. * * *

The said ten promissory notes described in the amended complaint were each and all made, given and delivered by the defendant, and taken, accepted and received by the plaintiff, for the use and benefit of and as agent for the Macomber - Savidge Lumber Company, **solely on the consideration aforesaid** and on the agreement and understanding between the parties to said notes, had and entered into at the same time the notes were given, that the defendant should thereby become bound as surety and guarantor for the Modoc Lumber Company up to the amount of $50,000.00 for the payment of said indebtedness then existing and owing from the last named company to the Macomber - Savidge Lumber Company as here-

inbefore set forth, and not otherwise.

The requirements of the law as to the framing of an issue of want of consideration are simple. In 8 C. J., p. 916, subject, "Bills and Notes," Section 1204, under the sub-title, "Sufficiency of Plea of Want of Consideration," it is said:

> A general averment that defendant made the contract without any consideration therefor, or the use of equivalent language, is usually deemed sufficient.

Sustaining this statement, see:

> Hunter v. McLaughlin, 43 Ind., 38, 45.
> Grimes v. Ericson, 94 Minn., 463.
> Goding v. The MacArthur Co., 181 Ill. App. 373.

The court will see that we have not only denied the allegations of the amended complaint respecting the making and consideration of the notes to have been anything else than what we affirmatively allege the facts to have been; but that we have gone to the pains of setting up fully the exact facts, showing what the consideration actually was, and that it did not proceed from the plaintiff, but from his corporation. We think the court will agree with us that the pleadings were ample to permit us to present the facts.

We turn now to the assertion of our opponents that the answer to the amended complaint contains no allegation that the consideration was illegal, and to the contention, based thereon, that we could

not urge, and the court could not consider, the question of the illegality of the consideration to sustain the notes, against the plaintiff's claim that the notes were given for his own sole and personal benefit and not for the benefit of his corporation. It is true, that there is no allegation in the answer that the consideration for the notes was illegal. Such an allegation, if inserted, would have been a mere conclusion of law. We did set forth in the answer, quite explicitly, the facts as to what the actual consideration was, namely, certain concessions respecting the Macomber-Savidge Lumber Company's claim as a creditor against the Modoc Lumber Company, negotiated and granted on behalf of the Macomber-Savidge Lumber Company by and through the plaintiff as its president. That such a consideration as the basis for a private benefit to the officer himself who negotiates and makes the arrangement, is an illegal consideration, follows as inevitably, as a conclusion of law from the facts pleaded, as darkness follows the going down of the sun. Plaintiff and his attorneys seem to think that it was perfectly legitimate for the chief and managing officer of a corporation to bargain away its rights and take for himself in return therefor security he might have got for the corporation itself, and that he can stand up in a court room and boldly say, "I did it, but you have not alleged that it was illegal," and escape on that footing with his ill-gotten booty.

Even if we had not thus explicitly pleaded the

facts which show the consideration to be illegal, if the plaintiff is, as he asserts, the beneficial owner of the notes, the facts are so far admitted by the plaintiff as to what the consideration was, that we would be entitled to the advantage of the defense of illegality of consideration.

Oscanyan v. Arms Co., 103 U. S., 261.
Chandler v. Lack, (Okla.), 170 Pac. 516, 14 A. L. R. 461.
Ah Doon v. Smith, 25 Ore., 89.

The position taken by plaintiff in his brief as to what was the actual consideration for the notes sued on, makes the case simple. It amounts virtually to an admission that the consideration was what defendant has said it was in the answer to the amended complaint, namely, an agreement that the plaintiff's company would join the rest of the creditors, turn its claim over to the Board of Trade and reduce the claim as thus filed to $53,905.92.

We think we have abundantly established that so far as the pleadings were concerned defendant was entitled to introduce evidence as to what was the consideration for the notes and the written agreement which accompanied them.

The next point alleged against our right to introduce such proof is that we were barred by the parol evidence rule from introducing evidence respecting the consideration for the notes and the written agreement. We have already shown that when the writing appears on its face or is admitted

to be incomplete and not to set forth all of the terms of the agreement, the parol evidence rule does not apply. We have also advanced the contention that proof of the consideration was under the circumstances here presented one of the proper facts to be shown under Sec. 717 Oregon Laws. One of our defenses set up in the answer is that the notes were collateral security. An inference that such is the case is raised up by the fact that it appears on the face of the contemporaneous writing that any payments made on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company were to be credited on the notes. In 22 C. J., p. 1147, the principle is stated that "parol evidence is admissible to aid an inference which may be deduced from a written instrument." We have found also that the plaintiff admits in his brief that the consideration for the notes and the written agreement was something not stated in the writings, and relies on the parol evidence in the case to establish the facts in respect thereto. Aside from these matters, which it seems to us completely dispose of the objection interposed against the introduction of evidence to show what the consideration was, it is well established that the true consideration of a note may be shown by parol; and such proof constitutes no breach of the parol evidence rule.

People's Bank & Trust Co. v. Floyd, 200 Ala. 192, 75 So. 940.

First State Bank of Eckman v. Kelly, 30 N.D.

84, 152 N.W. 125, Ann. Cas., 1917 D, 1044.
Herrman v. Combs, 119 Md., 41, 85 A., 1044.
Stalnaker v. Tolbert, 121 S. C., 437, 144 S. E., 412.
Dixon v. Miller, 43 Nev., 280.
State Savings Bank of Logan v. Osborn, 188 Iowa, 166.

Defendant is not precluded by the recitation in the notes that they were given for value received from showing by parol that there was in fact no consideration or no lawful or valid consideration entitling the plaintiff to recover thereon in his own interest. The presumption of a consideration raised by Sec. 24 of the Negotiable Instruments Act is merely **prima facie** and may be rebutted.

Dougherty v. Salt, 227 N. Y. 200.
Shriver v. Danby, 12 Del. Ch. 84, 106 A. 122.
State Savings Bank of Logan v. Osborn, 188 Iowa, 166.
Kramer v. Kramer, 181 N.Y. 477, 74 N.E. 474.
In the Matter of Pinkerton, 49 Misc. 363, 99 N. Y. S. 492.
Holbert v. Weber, 36 N. D. 106, 161 N. W. 560.
First Nat'l Bank of Bangor v. Paff, 240 Pa. St. 513, 87 A. 841.
Nicholson v. Neary, 77 Wash. 294, 134 P. 492.
Lombard v. Bryne, 194 Mass. 236, 80 N. E. 489.
Cawthorpe v. Clark, 173 Mich. 267, 138 N. W. 1075.
Best v. Rocky Mt. Nat. Bank, 37 Colo. 149, 85 P. 1124, 7 L. R. A. (N. S.) 1035.

Citizen's Nat. Bank v. Bean, 26 N. M. 203, 190 P. 1018.
Ginn v. Dolan, 81 Ohio St. 121, 90 N. E. 141, 135 A. S. R. 761, 18 Ann. Cas. 204.
Hudson v. Moon, 42 Utah, 377, 130 P. 774.
Shriver v. Danby, 12 Del. Ch. 84, 106 A. 122.
8 C. J. 916, and cases cited.

Plaintiff's attorneys interpret the words "prima facie" used in respect to the presumption of consideration in the negotiable instruments act as meaning conclusive and indisputable. The courts do not regard it in any such light, as will appear from an examination of the cases we have just cited. For instance, in Dougherty v. Salt, 227 N. Y. 200, the Court said respecting the expression "value received" used in the note:

> "The formula of the printed blank becomes in the light of conceded facts a mere erroneous conclusion which can not overcome the inconsistent conclusion of the law."

In the case of Nicholson v. Neary, 77 Wash. 294, the Court said, having this very point under consideration:

> "A presumption of fact is not evidence, but a rule of law fixing the order of proof. When proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case by competent evidence."

The plaintiff makes the point that no failure of consideration is pleaded. It is pleaded, in the answer, that the notes were given only as collateral security, and that the principal debt has been paid. In the case of La Grande Nat'l Bank v. Blum, 26 Ore., 49, in an opinion written by the same able judge who tried this case below, it was held that the maker of a note as against the payee, may show by extrinsic evidence that the note was made and delivered as security for the performance of a contract by him, and that he has performed his contract; and such evidence does not change or add to the terms of the writing, but shows simply a failure of consideration.

Encountering once again in plaintiff's brief the contention that our answer is insufficient to admit proof of the facts objected to, we are led to say that we wish the plaintiff would tell the Court at the oral argument just what are the material facts forming part of our defense which we have failed to plead, and also what material facts not pleaded the lower court has included in its findings. We believe we have pleaded all the facts we have offered evidence to prove. We certainly have pleaded all the facts to the proof of which objection was made, and all the facts found by the lower court. We can not perceive the slightest footing for the contention that the answer is insufficient to admit the proof.

At the foot of page 39 of plaintiff's brief, his

counsel naively say that "there was no ambiguity in the ten notes introduced by the plaintiff herein, and it was error to admit evidence of surrounding circumstances." Was there any ambiguity in the contract, Defendant's Exhibit B, which admittedly was a part of the same transaction? But entirely aside from the matter of ambiguity, there is no such rule as plaintiff's counsel here have put into words. No case is cited in which any court has held that proof of the surrounding circumstances is not admissible for the construction of a writing. Abraham v. O. & C. R. R. Co., which plaintiff's counsel cite, quotes with approval, on page 501, the language of Mr. Justice Clifford, in Moran v. Prather, 90 U. S. 501, as follows: "Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, **the subject-matter, and the surrounding circumstances.**"

This plainly means that proof of the subject matter and surrounding circumstances is receivable in all cases. In Meyer v. Everett P. & P. Co., this Court held that letters written prior to the contract were properly received in evidence to explain its meaning.

We think we have shown that the oral evidence called for by the question and answer covered by the fourth assignment of errors was admissible, on each and all of the following grounds:

1. The fact as to the consideration was part of the subject matter and one of the existing circumstances provable under Section 717 Oregon Laws.

2. The written agreement, Defendant's Exhibit B, is ambiguous on its face, and proof of the consideration, among other things, is necessary to a correct interpretation thereof.

3. Said Exhibit B mentions a conversation and a prior agreement as the basis thereof, and indicates on its face that it is not a complete embodiment of the contract between the parties, which circumstance renders parol proof admissible to supply the missing parts.

4. The admissions made by the plaintiff in his brief show that there were important terms, including the consideration for the agreement, which do not appear in the writing and which rest in parol.

5. The plaintiff himself has adopted parol evidence as the basis for supplying these missing terms of the agreement.

6. Defendant's Exhibit B contains provisions which raise an inference that the notes were collateral to the debt of the Modoc Lumber Company. Parol evidence is permissible to aid that inference.

7. Where the consideration for a negotiable instrument is put in issue by the pleadings, parol evidence is admissible to show the true consideration.

We turn now to the discussion of the contention that defendant was barred by Section 808 Oregon Laws, quoted on page 40 of plaintiff's brief, from showing by parol evidence that the notes sued on were given as collateral security or a guaranty. We have called Mr. Goldthwaite a limited guarantor. This contract was made in California. We have been a little puzzled to define Mr. Goldthwaite's position thereunder. It does not appear to matter whether he be called a guarantor or a surety.

California Civil Code, Edition 1923, Title xiii, Sec. 2787, defines a guaranty as follows:

> A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

In Montgomery vs. Sayre, 91 Cal., 206, it is held:

> The maker of a note given to secure the payment of the note of a corporation, endorsed by a third person, and secured by mortgage upon the property of the corporation, is, in law, a surety, and if such endorser is released from obligation to pay a deficiency judgment rendered against him and the corporation jointly, in a suit for foreclosure of the mortgage and which became a lien upon the lands of the endorser, the maker of the collateral note is exonerated from liability.

Does the record show any error of the lower court in receiving parol evidence to establish the fact found by the court that the notes were exe-

cuted as collateral security and a limited guaranty of the indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company? We have shown that there are only three exceptions in the record, the first, set forth in assignment number I, being a question as to whether immediately before the notes were signed there was any argument between the plaintiff and the defendant as to whether the Macomber-Savidge Lumber Company would put its claim into the hands of the Board of Trade; on which objection the court reserved its ruling, and the question was never answered.

The second exception, if it be deemed that there is one, is set forth in the second assignment. The question objected to was whether at the time when Goldthwaite agreed to approve the account of the Macomber-Savidge Lumber Company, Macomber, the plaintiff, made any question as to whether he was representing his company or himself personally. Inasmuch as the plaintiff has himself testified at page 114 that he made the settlement on behalf of his company, error can hardly be alleged as to the reception of Mr. Goldthwaite's testimony on the same point.

The other exception is found in the fourth assignment; the question objected to being a question put to the defendant as to whether there was any other consideration for the notes than that stated in the answer. In deciding whether the court erred in receiving this testimony, it must be

borne in mind that the fact that the notes were a collateral guaranty was not the sole defense in the case. There was, as we have pointed out in detail, the defense of illegality of consideration, which the lower court has ruled, as a matter of law, was a good defense, if the notes were in fact given for the personal benefit of the plaintiff, in consideration of any action which he took on behalf of the Macomber - Savidge Lumber Company, of which he was president. There was also the defense that the notes were discharged by the payments made to the full amount of $53,905.92 on the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, by virtue of the terms of the written agreement, Defendant's Exhibit B, as it must be interpreted in the light of the relations of the parties and the surrounding circumstances. The evidence objected to under the fourth assignment of error was admissible on these issues, notwithstanding it might have a tendency to show that the notes were given as collateral security. But we are ready to maintain that the evidence objected to was admissible, as against any objection made thereto, even if there had not been these other defenses set up in the answer.

In 27 C. J. at page 381, discussing the statute of frauds, the law is stated as follows:

> Since, however, this rule does not require any other rules in respect to the competency of parol evidence to be applied to contracts within the statute than are applicable to writ-

> ten contracts in general, parol evidence is admissible to show the situation and relation of the parties and the surrounding circumstances at the time the contract was made.

The foregoing statement of the law is abundantly supported by authorities.

This being so, proof of what the consideration for the notes and contract was and who paid it would be admissible, not for the purpose of showing that the notes were not binding obligations, but for the purpose of showing for whose benefit they were given, and who owned them, which were issues in the case, tendered not only by the defendant in his answer, but by the plaintiff in his complaint and in his reply. Surely the plaintiff can not tender such issues in the pleadings and then say that no evidence bearing thereon is receivable.

We maintain that on the basis of the facts pleaded in the answer, assuming now for the purpose of the argument that those facts are established, the position of Mr. Goldthwaite as maker of these notes was that of a guarantor or surety for his company on its debt to the Macomber-Savidge Lumber Company, up to the amount of $50,000. Before going further with the discussion of Section 808 Oregon Laws and the argument now made on the authority of said section as to alleged error in the introduction of evidence respecting the consideration for the notes, we wish to establish our legal

position as to defendant being a guarantor or surety.

THE FACTS AND CIRCUMSTANCES WERE SUCH AS TO CONSTITUTE GOLDTHWAITE NOTHING MORE THAN A LIMITED GUARANTOR OF THE DEBT OF HIS COMPANY.

The only debt existing at the time the notes were signed, was the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company. The Modoc Lumber Company was principal debtor, and liable in the first instance to pay the debt.

The Supreme Court of Oregon, in the case of Hoffman vs. Habighorst, 49 Ore., 387, has quoted and adopted the language of Mr. Chief Justice Cooley in the case of Smith vs. Sheldon, 35 Mich. 42, as follows:

> Now, a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds are taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but, if he knows that one party is surety merely, it

is only just to require of him that in any subsequent action he may take regarding the debt he shall not lose sight of the surety's equities.

In the same case, at pages 381 and 382, the court said:

> * * * It may be shown by parol that a promissory note was in fact made to secure the debt and liability of another, and thus all the makers be entitled to the rights of a surety as to the payee of such note having knowledge of the facts. If such a note is enforced against the makers, they would clearly be entitled to be indemnified by the principal debtor; and this is given as one of the tests of suretyship. The form of the obligation would not prevent the introduction of such evidence.

In the same case, in 38 Ore. at page 268, the court said:

> But, within the meaning of the rule under consideration, every one who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the position of a surety, whatever may be the form of his obligation. It is true that generally the primary obligor or real debtor joins in the contract with the sureties. This is not, however, believed to be necessary or essential. 'The relation of suretyship,' say the editors of White & Tudor's Leading Cases in Equity, 'grows out of the assumption of a liability at the request of another, and for his benefit. It may, consequently, arise, although the name of the principal does not appear in the instrument which constitutes the evidence of the debt.

In Colebrooke on Collateral Security, the author gives the following definition:

> Sec. 2. Collateral security is a separate

> obligation, as the negotiable bill of exchange or promissory note of a third person * * * delivered by a debtor to his creditor to secure the payment of his own obligation represented by an independent instrument. Such collateral security stands by the side of the principal promise as an additional cumulative means for securing the payment of the debt. * * * 'Collateral', in the commercial sense of the word, is a security given in addition to the principal obligation, and subsidiary thereto.

In Section 10, Colebrooke says:

> Such delivery of negotiable instruments as collateral security may by agreement between the parties be made to a third person.

In Joyce on Defenses to Commercial Paper (1 Ed.) Sec. 213, the author says:

> No exact line of demarkation between a guarantor and a surety can be satisfactorily made.

In Colebrooke on Collateral Security, Sec. 202, the writer says:

> The contract or undertaking of a surety is a contract to be answerable for the payment of some debt or the performance of some act or duty in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. Such contracts may be arranged in three divisions:
>
> 1. Those in which there is an agreement to constitute for a particular purpose the relation of principal and surety, to which agreement the creditor thereby secured is a party.
>
> 2. Those in which there is a similar agreement between the principal and surety only,

to which the creditor is a stranger; but in which the creditor, having notice of such relations between the parties, will not be at liberty to do anything to the prejudice of the rights of the surety or to refuse (when his own just claims are satisfied) to give effect to them.

3. Those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

The fact that one may benefit indirectly by a transaction does not make him a principal. It was so held in the case of Hughes v. Ladd, 42 Ore., 123, which is also instructive on other points. The principal debtor in that case had signed no note; but it appeared that the money was borrowed and used for its corporate purposes; and the individual signers were therefore held to be sureties only.

The facts of the case, considered in the light of the foregoing legal authorities, make it clear that the position of the defendant was that of a surety or guarantor for his company. We have called him a guarantor because of the statutory definition in the Civil Code of California quoted above. It is undisputed that the Modoc Lumber Company, at the time the notes were given, was indebted in a large amount to the Macomber-Savidge Lumber Company; that Goldthwaite was the owner of all the capital stock of the Modoc Lumber Company,

and its president and managing officer; that Macomber was one of the principal stockholders, and was the president and managing officer of the Macomber-Savidge Lumber Company; and the lower court has found that these parties were representing their respective corporations in the negotiations which were under way at the time the notes were given, and prior thereto.

Now,with regard to Sec. 808 Oregon Laws, the first remark we have to make is that it has nothing to do with the case, so far as the validity and obligation of the contract are concerned. This being a contract made and to be performed in the State of California, we take it to be well settled law that we must look to the laws of that State for our guidance as to everything touching its validity.

Selover Bates & Co. v. Walsh, 226 U. S. 112, 33 Sup. Ct. 69.

In re Barnett, 12 F (2d) 76.

Scudder v. Union National Bank, 91 U. S. 406, 412.

Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641.

Callaway v. Prettyman, 218 Pa. 293, 67 A. 418.

Assuming that the contract, in respect to the substantive law by which its validity and obligation must be determined, is governed by the law of California, we will examine for a moment the provisions of that law. The applicable part of Sec.

1624 of the Civil Code of California, of which plaintiff quotes only a portion on page 40 of his brief, reads as follows:

> "Sec. 1624. The following contracts are invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or his agent. * * * 2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Sec. 2794.

Sec. 2793 of the same Code reads as follows:

> "Except as prescribed by the next section, a guaranty must be in writing and signed by the guarantor; but the writing need not express a consideration."

As a matter of course a contract of guaranty, like any other contract, must have a consideration to make it binding. Inasmuch as the law of California not only omits from Sec. 1624 any requirement that the consideration must be stated in the memorandum, but in Sec. 2793 it expressly provides that the writing need not express the consideration, it remains that in every case where the consideration is not expressed in the writing, it must be proved by parol.

The next remark we have to make respecting the invocation by the plaintiff of Section 808 Oregon Laws as the basis of his claim that there was error in the admission of the evidence covered by the exception embodied in the fourth assignment of error is, that no such objection was interposed in the lower court, and the point was not raised

there. We refer again to page 153 of the transcript. It will be found that the only grounds stated for the objection were, that no failure of consideration was pleaded, that the fact attempted to be proved had not been pleaded in the answer, and that the evidence asked for varied the contract. Not a word is to be found in the objections with respect to the Oregon statute of frauds, or any other statute of frauds. As a rule of substantive law, the Oregon statute has no application, as we have shown; and it is well settled and elementary that as a rule of evidence the statute is waived, unless objection on the ground thereof is duly interposed at the time the evidence is offered.

Nunez v. Morgan, 77 Cal. 427.
Gilman v. McDaniels, 177 Iowa 76.
Miller v. Harper, 63 Mo. A. 293.
Holt v. Howard, 77 Vt. 49.
Eaves v. Vial, 98 Va. 134.

Finally on this specific point of Sec. 808 Oregon Laws, we call attention to the fact that the Supreme Court of that state in Hoffman v. Habighorst, 38 Ore. 261, has negatived all the contentions plaintiff is advancing in respect to the admission of parol evidence to show that the maker of a promissory note is in fact a surety. That case, like this one, involved a promissory note to which the principal debtor was not a party. The court said, at page 267:

> The admission of parol evidence to show the true relationship of the makers of a promis-

sory note, and that the payee had notice thereof, does not alter or vary the terms of the original contract, or affect its integrity. It is merely proof of an independent or collateral fact, which operates to relieve the surety from liability when the creditor, with knowledge of the fact, has changed the original or made a new contract with the principal debtor, without the knowledge of the surety, or released any security he may hold for the payment of the debt. "The fact that one debtor is a surety for the other is no part of the contract with the creditor," says Mr. Chief Justice Gray, "but is a collateral fact showing the relation between the debtors; and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence"; Guild v. Butler, 127 Mass. 386. * * *

Within these principles there seems no valid reason why it may not be shown by parol that a promissory note was in fact made to secure the debt and liability of another, and thus all the makers be entitled to the rights of a surety as to the payee of such note having knowledge of the facts. If such a note is enforced against the makers, they would clearly be entitled to be indemnified by the principal debtor; and this is given as one of the tests of suretyship. The form of the obligation would not prevent the introduction of such evidence, because, as said by Mr. Justice Campbell, in Canadian Bank of Commerce v. Coumbe, 47 Mich. 358 (11 N. W. 196), "it is always competent to show that any obligation, whatever its form, was in fact made for the debt or liability of another; and, where this is the case, the contract is one of suretyship, and the surety, if he is held to pay it, may sue for reimbursement. * * * And when a

creditor knows that his debtor is a surety he is bound to take no steps which will change the liability of the principal, without the surety's consent. * * * This doctrine is too elementary to require any discussion." Mr. Brandt says: "The sole maker of a promissory note is sometimes entitled to stand in the position of a surety"; 1 Brandt, Sur. (2 ed.), Sec. 38.

Furthermore, in the case of First National Bank vs. Hawkins, 73 Ore. 188, it was held that a promissory note is a sufficient memorandum of a guaranty to satisfy the statute of frauds, and that the recitation therein of the words "value received" is a sufficient expression of the consideration.

The rule thus announced in Oregon is not peculiar to that state. It is the general rule that it may be shown by parol that a promissory note absolute in form was in fact given as security.

Sec. 16, Uniform Negotiable Instruments Law

(Cal. Civ. Code, 3097, adopted, Laws 1917, Chap. 751).

Wigmore on Evidence (2 ed.), Sec. 2437 and note.

O'Brien v. Paterson Brewing and Malting Co., 69 N. J. Eq. 117.

Kelly v. Ferguson, 46 Howard Practice Reports (N. Y.) 411.

Lafayette Nat. Bank of Buffalo v. Eberly, 199 N. Y. S. 787.

Silva v. Gordo (1924), 65 Cal. App. 486, 224 P. 757.

Drovers' Cattle, Loan & Inv. Co. vs. McGraw (1921), 150 Minn., 50.

First Nat. Bank of Crary vs. Miller (1920), 46 N. D., 551.

Lopato v. Hayman, 43 R. I., 271.

Herron v. Brinton, 188 Iowa, 60.

Bell v. McDonald (1923), 308 Ill. 329.

Lamberson v. Love, 165 Mich. 460.

Dixon v. Miller, 43 Nev. 280.

Clark v. Ducheneau, 26 Utah, 97.

Howard v. Stratton, 64 Cal. 487.

Norton v. Tucson Cattle Loan Co. (Arizona, 1925), 236 P. 1110.

Bowker v. Johnson, 17 Mich. 42.

Schlamp v. Manewall, 196 Mo. App. 123, 190 S. W. 658.

Vinson v. Wooten, 163 Ark. 170.

Kirchdorfer v. Watkins, (1923 Ky. App.) 248 S. W. 251.

Lyons v. Stills, 97 Tenn. 514.

Allen's Col. Agency v. Lee (1925) 73 Cal. App. 68, 238 Pac. 169.

Ledford v. Huggins, 89 Okla. 224.

We are unwilling to lengthen this brief by setting out extracts from the decisions. Many of the above cases are close parallels to the one at bar. We call especial attention to Kelly v. Ferguson, Lamberson v. Love, Norton v. Tucson Cattle Loan Co., Clark v. Ducheneau, Vinson v. Wootan, Kirchdorfer v. Watkins, and Silva v. Gordo. In Kirchdorfer v. Watkins the court held that it was com-

petent to show by parol that a note was in fact executed as collateral security for another existing debt; and that a statement in a note that it was to be credited with one-third of the proceeds of the sale of corporate stock is a sufficient reference to another transaction to render competent parol proof that the note was given as part of a transaction involving the purchase of the stock, and that the maker was liable thereon only for the balance due from him on the other transaction.

Silva v. Gordo, a recent California case, was an action on a promissory note. The holding of the court is stated in the syllabus as follows:

> Parol evidence being admissible to show the consideration or want of consideration for a note sued on, the court erred in striking out special defense that the note was given and received only as security for faithful performance of an agreement, which defendants were ready, willing and able to carry out, irrespective of Civ. Code, Sec. 3097, authorizing proof that delivery was conditional or for a special purpose only.

The California decisions are reviewed therein. It makes special reference to section 16 of the Uniform Negotiable Instruments Act, which we will discuss later, and is in point on that part of the discussion. So much of the opinion is in point that we shall not copy extracts from it, but ask the court to examine the same.

Section 16 of the Uniform Negotiable Instruments Act (Cal. Civ. Code Sec. 3097, adopted Laws

1917, Chap. 751) contains the following language:

> As between immediate parties * * * the delivery may be shown to have been conditional, or for a special purpose only.

This section is said to be declaratory of the prior law, Story v. Story (1914) 214 Fed. 973; S. Allen Grocery Co. v. Buchanan Co. Bank (1916), 192 Mo. App. 476, 182 S. W. 777.

In numerous cases interpreting this section the courts have held that proof of such collateral facts as were proved in the case at bar may be made by parol evidence. We cite for instance:

Mason v. Cater, (Ia) 182 N. W. 179.

Devine v. Western Slope Fruit Grower's Ass'n., 27 Colo. App. 368.

Security Savings Bank v. Hambright, 192 Ia. 1147.

City National Bank of Huron v. Dwyer (S. D.) 200 N. W. 109.

A large part of the cases cited in the foregoing parts of this brief, holding parol evidence to be admissible under such circumstances, were decided by courts of states where the Uniform Negotiable Instruments Act was in effect at the time.

There is another principle well recognized by the courts, which is applicable here, and that is in an action on a promissory note or any other contract, it may be shown that the plaintiff is not the beneficial owner thereof and that the beneficial interest is vested in a third person; and a set-off

or other defense against such beneficial owner may be set up against the note.

Bowen v. Snell, 9 Ala. 481.
Hooper v. Armstrong, 69 Ala. 343.
Henry v. Scott, 3 Ind. 412.
Jump v. Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265.
Engs v. Matson, 11 Ill. App. 644.
Challiss v. Wylie, 35 Kan. 506.
Masterson v. Goodlett, 46 Tex. 402.
Strong v. Gordon (Mo. 1920), 221 S. W. 770.
Kelley-Clark Co. v. Leslie (Cal. Civ. App. 1923), 215 P. 699.
Andrews v. Varrell, 46 N. H. 20.
Bennett v. Tillmon, 18 Mont. 28.
Best v. Rocky Mt. National Bank, 7 L. R. A. (N. S.) 1035.

Summarizing our answer to the arguments of plaintiff under point One of his brief, covering assignments numbered I to VI inclusive, to the effect that the court erred in receiving parol evidence to establish the fact of suretyship, because of Section 808 Oregon Laws, we have shown:

1. The evidence objected to was admissible on other issues of the case.

2. The evidence was admissible under Section 717 Oregon Laws, entitling us to show the circumstances and relations of the parties.

3. Only the first, second and fourth assignments

are based on any exceptions to admission of evidence taken in the court below, and in none of them was the statute of frauds the basis of the objection.

4. The action being purely personal, based on a contract made and to be performed in California, the law of that state determines its validity.

5. The law of California does not require the consideration to be stated in the writing, but permits proof to be made independently thereof.

6. Plaintiff has waived any benefit of the Oregon statute of frauds, if it be applicable as a rule of procedure, by failing to object to the evidence on the ground thereof.

7. Even if there had been such an objection and an exception based thereon, it would be unavailing, because by the law of Oregon, parol proof is permitted to establish the fact that a promissory note was given only as security, and that the maker is a surety.

8. It is also settled law in that state that a promissory note evidencing the obligation of the surety is a sufficient memorandum under the statute of frauds, and that the words "value received" are a sufficient statement of the consideration.

9. This is the law generally; that is, it may be shown everywhere that a promissory note was in fact given as security.

10. The evidence was also receivable to show who was the beneficial owner of the notes.

POINT II OF PLAINTIFF'S BRIEF.

We read with astonishment the discussion under point II, relating to the seventh assignment, which alleges error of the Court in stating the law of the case in the opinion. Same is not founded on any exception. Instead of discussing that assignment, plaintiff's counsel discuss under the heading referring thereto an alleged erroneous finding of the Court with respect to the facts concerning the consideration for the notes, which alleged finding is not among the findings of fact made by the Court, nor is any such language as is here alleged, to be found in the opinion. Plaintiff sets up a list of things on page 42 of his brief, said to have been done by him and to be what the Court should have found to constitute the consideration for the notes. These things are put in a more or less distorted form, and the one numbered V is merely ridiculous. The consideration for the notes was, of course, as the lower court has found, the agreement, made and afterwards carried out by the Macomber-Savidge Lumber Company, to turn over its claim in a reduced amount to the Board of Trade, and to join with the other creditors in the plan for refinancing. As to allowing Menefee's indebtedness to be a preferred lien, there was no such indebtedness at the time. Menefee was to be induced if possibl to loan $250,000 of new money. As to allowing the other creditors to share in the lien of the second mortgage, there was no second mortgage, and would be none unless all the creditors participated, and it

might just as well be said that the other creditors were allowing the Macomber-Savidge Lumber Company to share therein. The balance of $17,000 omitted from the mortgage consisted mostly of a claim of $5000 for a commission which was not owing, and for which the undisputed testimony shows there was not the slightest basis (Transcript, p. 142), and a claim of $12,000 for a certain alleged shortage which did not exist (Transcript, p. 268). The same arrangement regarding credit and the taking of a second mortgage was made by all the rest of the 109 creditors whose aggregate claims amounted to abount $110,000. The arrangement was made by all parties because it was considered advantageous. Macomber's interest in his company was a 23% interest (Transcript, p. 128). Before he could get anything out of it as a stockholder, the debts would have to be paid, and the Company was insolvent. The indebtedness held by his company represented about 40% of the total indebtedness of the Modoc Lumber Company, and he owned less than one-fourth of the stock in this company. On that basis, Mr. Goldthwaite should have distributed his notes for $500,000 around among the remaining creditors and stockholders for their consent to the refinancing if they were to be treated on the same footing as Mr. Macomber claims he was being treated. It is to be observed that the things done and now alleged as a consideration were things done by the Macomber - Savidge Lumber Company. Plaintiff could not individually postpone the due date of the

Modoc Lumber Company's account or allow Menefee's indebtedness to be a preferred lien, or allow the other creditors to share in the lien of the second mortgage, or divide the company's claim into two parts. All these things, insofar as they were done, were done by the company—acting by him as its managing agent, it is true—but nevertheless done by the Company. And it was only as the Company might suffer loss thereby, that Macomber, owner of less than 25% of the stock, might indirectly suffer a consequential loss. While the discussion found under point II of plaintiff's brief can not ~~be~~ possibly, in the state of the record, be considered by the Court for the purpose of showing any error in the court below, the matter is valuable as constituting an admission as to what the true consideration for the notes was; and it comes very near to admitting that the consideration was just what is alleged in the answer. It would serve to cure the alleged error in receiving testimony to show such to be the case, if there had been any error therein.

POINT III OF PLAINTIFF'S BRIEF.

Plaintiff announces as the subject of discussion the question whether the testimony shows any evidence of suretyship. As we have pointed out in our preliminary discussion, none of the assignments VII to X inclusive is founded on any exception taken in the court below, and there are no exceptions in the record under which the question

here to be debated is put in issue. The discussion is therefore rather academic. The court may be better satisfied to know, before dismissing these assignments because there are no exceptions to support them, that the allegations of error possess no merit whatsoever when examined in the light of the facts. There is not only evidence of suretyship in the record, but such evidence is abundant. We will be as brief as we can in summarizing it.

1. It is undisputed that the Modoc Lumber Company was indebted to the Macomber-Savidge Lumber Company in an amount approximately equal to or exceeding the total of the notes at the time they were given.

2. It is undisputed that Macomber was at the time the president of the creditor company, and Goldthwaite was the president of the debtor company and its principal stockholder.

3. It is undisputed that the notes were given in connection with the adjustment of the account between the two companies. Such is not only admitted and testified to by both parties, but it appears on the face of the writing (Defendant's Exhibit B); and the copy of said writing which defendant received (Defendant's Exhibit F; Transcript p. 151) was written and signed by the plaintiff on the letterhead of the company.

4. The memorandum (Defendant's Exhibit B), executed simultaneously with the notes and forming a part of the one entire transaction, expressly

provides that any and all payments made on the aforesaid indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company are to apply against the notes. That circumstance of itself, linked to the circumstance listed above under 1, 2, and 3, is in our opinion sufficient to justify the finding of the court that the Goldthwaite notes stood as collateral security to the Modoc Lumber Company debt. If one debt was not collateral to the other, why should payments on one be credited on the other?

5. At the time the notes were signed, Macomber was acting on behalf of his company in the adjustment of its business affairs with the Modoc Lumber Company. He so testified himself, as shown at p. 114 of the Transcript: "At the same time I came to some agreement concerning the amount of that indebtedness with Mr. Goldthwaite **on behalf of my company.**" It is true, that he crawfished and squirmed and tried to say afterwards that he did not act on behalf of his company in the adjustment, and that nobody did. In support of this, he claimed to have done no business on its behalf December 15, 1921, the date of the Crittenden agreement, which false pretense was abundently disproved. For instance, on February 21, 1922, he, as President, executed the Sanborn assignment (Transcript, pp. 326, 333). On May 25, 1922, he, as president, executed the assignment of his company's claim against the Modoc Lumber Company to the Board of Trade (Defendant's Exhibit No. 1,

Transcript, p. 283) as he admits on the witness stand (Transcript, p. 125). He represented his company in the meeting of creditors at the Board of Trade the day after the notes were signed, or the same day (Transcript, p. 121). He instructed Mr. Sanborn, the trustee, as to the amount for which he should file the claim with the Board of Trade (Transcript, p. 122). He raised no question at the time that he was representing his company (Goldthwaite's testimony, Transcript, pp. 146, 149). He admits writing letters on behalf of his company after the date of the Crittenden agreement (Defendant's Exhibits C and D, Transcript, pp. 116, 117). As the representative of his company, he was elected a member of the Creditors' Committee of the Board of Trade on or about March 1, 1922 (Kent's testimony, p. 247); and later became chairman of the committee. He continued to handle the business connected with the sale of the lumber on hand in the yard all through the months of January, February, and March, 1922 (Kent's Testimony, pp. 248, 249). He personally, with his own hand, made the adjustment of the account with Mr. Goldthwaite on March 1st, 1922, as shown on the face of Defendant's Exhibit E (Transcript, pp. 146-148), striking out the disputed items, as shown by Mr. Goldtwaite's testimony at pages 149 and 150, thereby reducing the claim down to $53,905.92, and he agreed then and there to present the claim to the Board of Trade as thus cut down (p. 149). Indeed Macomber says in his own testimony at page 123:

> I understand at the time that the notes were signed that the claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company was to be filed with the Board of Trade in the amount of $53,905.92, and that was a part of the understanding that I came to with Mr. Goldthwaite at the time the notes were signed.

He went to the Board of Trade meeting one hour later (p. 154) and had the Macomber-Savidge Lumber Company, with himself as its representative, elected a member of the committee (Brainard's testimony, p. 280). He admits at the foot of page 121 that he went before the Board of Trade meeting that day **on behalf of the Macomber-Savidge Lumber Company.** How in the world could it have been a part of the understanding that the claim was to be filed with the Board of Trade in the reduced amount of $53,905.92, the exact amount for which he had adjusted it with his own hand, unless he made that agreement on behalf of his company with Mr. Goldthwaite? He admits at page 121 that his company was engaged in the liquidation of its affairs through Mr. Sanborn "and the only part I took was that which was necessary to complete unfinished business." The adjustment and the obtaining of security for this disputed account were just as much unfinished business as anything else. The pretense now made on his behalf that he was only giving his personal consent that his company might reduce the claim if it saw fit and file it with the Board of Trade, and that he

got $50,000 in notes for such personal consent, is as barefaced a sham and subterfuge as any one ever attempted to put over on a court.

6. The consideration for the notes came from the Macomber-Savidge Lumber Company and was, to wit, that the company would cut down the face of its claim below $54,000, and place it in the hands of the Board of Trade and participate in the refinancing plan. Plaintiff chose to leave the facts as to what the consideration for the notes was shrouded in mystery to the close of the trial. Nowhere in his pleading or in his testimony was there a hint respecting it, excepting as the facts surrounding the transaction and the terms of the contemporaneous writing pointed strongly to what it must have been. Even in the face of defendant's testimony that the consideration was nothing else than what the defendant had set forth in his answer, the plaintiff elected to sit stubbornly mute in the court room. When defendant testified that there was no consideration except the one set forth in his answer, plaintiff's attorney did not even cross-examine him on the point. Defendant's testimony as to what the consideration was stands uncontradicted, and it is confirmed by every circumstance of the case. Plaintiff's attorneys have now in their brief abandoned the thin cover of the **prima facie** presumption of consideration and have undertaken to state what the consideration was. It is elementary law that when the plaintiff once sets forth what he claims the consideration to have been, room

for any presumption for his benefit that it was anything else is gone. He must then recover on the ground that he has alleged, or not at all. When the plaintiff, driven from cover, at last undertakes to allege the actual consideration for the notes, he is not able to point to anything except a consideration wonderfully like the one defendant has set up in his answer. These admissions point to just one thing as the consideration, to wit, the concessions made at the time the notes were executed concerning the claim of the Macomber-Savidge Lumber Company against the Modoc Lumber Company. Plaintiff admits now at least that the consideration was connected with said concessions. Mr. Goldthwaite has testified at page 153 that there was no consideration for the notes excepting these concessions by the Macomber-Savidge Lumber Company. This testimony stands uncontradicted. Plaintiff did not take the stand and testify what the consideration was or to deny the testimony of the defendant that it was just what the defendant had set up in his answer, and nothing else. Defendant also testified on this same point, (p. 153) and his testimony likewise stands undisputed, that at the time the the notes were given he did not personally owe Mr. Macomber any money and that Macomber never loaned any money to him.

7. The defendant has testified that the notes were given as collateral security to the debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company. At page 152 appears his testi-

mony that he protested to the plaintiff at the time the notes were given that the indebtedness was a debt of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, and that defendant's notes ought therefore to run to the latter corporation. In response to which the plaintiff "outlined to me again as he had, on a number of occasions past the fact that he was having a great deal of trouble with his other partners in the Macomber-Savidge Lumber Company; that he had had trouble with his first assignee, Crittenden, that he didn't know how the new assignee, Sanborn, was going to act, and that he desired if possible to have these notes in his own name in case any trouble arose in the future where he could have the whip hand, or dominate the situation, within his own company. He went into some extensive length impressing me with the situation."

Defendant further testified on cross-examination, in response to questions put by plaintiff's attorney (p. 211) that there was no discussion between plaintiff and himself as to his giving plaintiff individual compensation for the purpose of getting his company into the San Francisco Board of Trade; and that (p. 221) the transactions were purely a business deal between the two companies and had nothing personal in them; that (p. 224) defendant did not expect to pay the notes himself, but expected the company to pay them, and that the notes were collateral; and that (p. 226)

A. * * * As far as assuming any personal liability in the matter, to Mr. Macomber's company, I had previously told him that I was unwilling personally to assume anything more than I believed the actual amount to be, and that was something less than fifty thousand dollars; and at the same time the subject of the second mortgage was under consideration. We were very desirous of putting it through, planned on putting it through, and it was my desire naturally to have my notes protected by the second mortgage notes. In other words, to have the second mortgage notes between me and the payment. * * *

Q. It seems from what I understand of what you say, you regarded these notes as a company agreement with another company?

A. No, it was my agreement to protect the Macomber-Savidge Lumber Company to the amount of $50,000, providing that sum was not paid in some other form through the Board of Trade.

Q. Personally, then your signature as an individual was all right, but the complaint you make is that the notes should have run to the Macomber-Savidge Lumber Company as payee, instead of Mr. Macomber as an individual?

A. No question about that. I protested at the time and told him so.

* * * *

Q. Why did you make the sum total of your ten promissory notes $50,000, instead of fifty-three thousand and some odd dollars?

A. I think I just explained that a moment ago; that I was unwilling to give a personal guaranty for any more than I believed the company owed.

Not one of these statements of the defendant, elicited either on direct or cross-examination, as to what took place between himself and the plaintiff respecting the notes, was contradicted in any particular by the plaintiff on the witness stand.

It is uncontradicted that the parties had previously met on February 28th and discussed the affairs of their two companies, and tried to reach an adjustment. It seems probable that Macomber prepared the memorandum (Defendant's Exhibit B) on that day, as it bears that date. It is uncontradicted that they had had, prior to the time the notes were signed, a conversation in which Macomber had asked Goldthwaite to go security for his corporation's debt, and Goldthwaite had told him that he was unwilling to become security for more than he believed to be actually owing. It is uncontradicted that when Macomber laid the notes before Goldthwaite for his signature, the latter protested that they ought to run to the Macomber-Savidge Lumber Company, and that Macomber's answer was that he was having a great deal of trouble with his other partners in the Macomber-

Savidge Lumber Company, that he had trouble with Crittenden, and he did not know how Sanborn was going to act, and that he desired, if possible, to have these notes in his own name in case any trouble arose in the future, so he could have the whip hand, and dominate the situation within his own company. That statement of Macomber's, **which he does not deny making,** was not sufficient to convert the notes from collateral security for the debt of his corporation, as Goldthwaite understood they were to be, into notes given for Macomber's personal benefit. When Goldthwaite said that the notes ought to run to the corporation, Macomber did not dispute that statement, nor say, No, it must be understood between us definitely now that these notes are not taken as collateral to the debt due the Macomber-Savidge Lumber Company, and that they are given for my sole personal benefit. He said nothing of that kind. His answer conceded the fact that the notes were taken for the benefit of his corporation, but he gave plausible reasons why he wanted them in his own individual name. By having the notes in his own name, he would have the advantage of controlling any litigation to collect them, and presumably the money would pass through his hands, if it ever became necessary to collect these collateral notes.

Please remember that almost all the direct testimony as to the notes having been given as collateral security and as to what was said between the plaintiff and the defendant in respect to the defendant

giving such security, was elicited by the plaintiff's own attorney on cross-examination and is in the record without any objection, motion to strike or exception thereto.

Plaintiff seeks to brush all this testimony aside by the quotation on page 44 of his brief of a question and answer in which defendant stated that the notes were not discussed at all. What is plainly meant is that the details of them, such as the Court was asking about, were not discussed.

We come now to that part of plaintiff's brief in which the argument is made that the subsequent payment of the notes, amounting to $53,905.92, which were given to the Board of Trade by the Modoc Lumber Company to represent its debt to the Macomber-Savidge Lumber Company, effected no discharge of the Goldthwaite notes. That question is not even remotely suggested by any exception in the case. We assume that plaintiff is discussing it under his tenth assignment. As a matter of course, if the notes were given as collateral security to the debt of the Modoc Lumber Company, they were discharged when that principal debt was paid. The only thing peculiar in the situation is that the collateral notes were for a less amount than the principal debt. There have been other such cases. We call attention to the following:

Carson v. Reid, 137 Cal. 253.
Eddy v. Sturgeon, 15 Mo. 199.
Mark v. Schwartz, 14 Ore. 178.

1 Brandt on Surety (3 Ed.) Sec. 103.
Fidelity & Casualty Co. v. Van Dyke, 99 Ga. 543.
Burbank v. Buehler, 108 La. 39.

All these cases hold that when collateral security is given for a limited part of a principal debt, the collateral obligation will be discharged when such amount of the principal debt as the collateral security stands for has been paid, no matter whether it has remained in the hands of the original creditor or not.

The position of plaintiff's attorneys on this point, as stated on page 50 of their brief, is that:

> A consideration of the circumstances under which the agreement was made and the matter to which it relates, can lead to no other conclusion than that the parties had in mind only money payments to be made directly to the Macomber-Savidge Lumber Co. or to its trustee, Sanborn, because at the time it was made these were the only persons or obligations in which any direct payments could have been made.

As we read that sentence and many more of the same tenor in this section of plaintiff's brief, we are impelled to shout lustily that plaintiff is "varying the written contract" in a manner little short of mayhem. Where do his counsel get leave to insert the word "money" before the word "payments"? Where do they find Sanborn's name in the writing? On what footing, in the language of

the contract, do they justify their statement that only payments "**directly** to the Macomber-Savidge Lumber Company or to its trustee," were to be credited? The parties had in mind when the notes were delivered ,that the claim of the Macomber-Savidge Lumber Company was to be assigned to or at least handled and collected on behalf of the Macomber-Savidge Lumber Company by, the Board of Trade of San Francisco. It is mentioned in the writing. Why do plaintiff's counsel now cast it out of the reckoning and say that only payments **directly** to the Macomber-Savidge Lumber Company, or its assignee, Sanborn, were to count, when the Board of Trade **is** mentioned in the writing and Sanborn **is not.** When they bring Sanborn in, they recognize that payments to an assignee of the claim are just as effective as payments to the Macomber-Savidge Lumber Company. Why then do they read into the writing one assignee who is not mentioned and leave out the other prospective assignee who is mentioned? The plain sense of the writing, which plaintiff's counsel have not been able to keep from penetrating into their own minds when they mention Sanborn, is that all payments on the claim to a rightful holder thereof are to be credited against Goldthwaite's notes. It is the "claim of the Macomber-Savidge Lumber Company" that is mentioned, and all payments made on that claim to any rightful holder and no matter to whom made, are to be credited on the notes. Suppose Mr. Sanborn had resigned the office of trustee and his title to

the choses in action of the company had been transferred to a new assignee—would plaintiff's counsel question that payments to Sanborn's successor would have entitled Goldthwaite to have credit on the notes? We opine not.

Now suppose the Board of Trade with the consent of the creditors, including the Macomber-Savidge Lumber Company and Sanborn, its trustee, had transferred the notes representing the creditor's claim to a new representative of the creditors —some trust company for instance, as it might well have done—and the payment had been made to the new trustee instead of to the Board of Trade—would plaintiff's attorneys deny Goldthwaite the right to a credit for that payment? That is getting pretty warm, and we suppose they would squirm before they would answer that question. It is obvious however, that they would not have any footing to deny the credit. But that is practically what did happen, except that instead of transferring the claim to a new trustee to collect it for the creditor, the Board of Trade with the sanction of the creditor, sold and assigned the claim to a purchaser, who did afterwards collect it in full. It is payment of the **claim** which entitles Goldwaite to the credit, regardless of the question of who got the payment, so long as it was made to a rightful holder of the claim. We allege, in paragraph VI of our answer, that the notes were given on the understanding that "any and all payments made on any part of said indebtedness of

the Modoc Lumber Company to the Macomber-Savidge Lumber Company, whether on the part thereof so turned over to or handled through the Board of Trade of San Francisco, or the balance thereof not so turned over or assigned, should be credited against the said personal notes to be given by the defendant herein as a guaranty, up to the amount of defendant's said notes." This written agreement constitutes the proof of that allegation, and is quite sufficient therefor. It therefore follows that, independently of whether the notes were collateral security for the debt or not, this agreement between the parties, duly set forth in the answer, in conjunction with the fact, established and admitted, that the identical debt referred to, " translated into the Board of Trade notes," as plaintiff's counsel aptly said in the court below, was paid off, constitutes a complete defense to the notes.

After the arrangement was entered into for the representation of the Macomber-Savidge Lumber Company by the Board of Trade, its claim was assigned to G. W. Brainard, Secretary of the Board of Trade (Defendant's Exhibit No. 1, p. 283). In exchange for the mortgage notes of the Modoc Lumber Company and the Williamson River Logging Company, which the creditors were to get, the Board of Trade was required to certify that the debts had been satisfied. This was done by an instrument which appears at page 289, marked "Defendant's Exhibit M." The claim of the Macomber-Savidge Lumber Company was included in

this certificate of satisfaction. Mr. Brainard testified, as shown at page 295, that these notes were accepted at that time by the Board of Trade or by him as the representative of the creditors who had placed their claims in his hands, in settlement and discharge of the original claims. We think it is plain on the face of this transaction that that portion of the original debt of $53,905.92 covered by the mortgage notes given to the Board of Trade was completely wiped out and satisfied when the notes were accepted to cover the same. The foregoing is a question of fact, which is settled by the documentary evidence in the case; it appearing that one of the conditions of the arrangement was that the notes were to be taken in absolute satisfaction of the indebtedness. We do not say this for the purpose of making the claim that the giving of these notes amounted to a payment of more than $50,000 on the indebtedness in question; because we think the parties contemplated, at the time the notes were given, that such a change in the form of the indebtedness would be or might be made, and the notes were given as a collateral guaranty with that in view. Our point is, that the notes given to the Board of Trade were not given as collateral to the indebtedness for the open account of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, but said notes wiped out that much of the open account and constituted the only form in which said indebtedness up to the sum they covered, remained in existence.

In other words, they were thenceforth a part of the indebtedness—far the larger part thereof—to which Goldthwaite's notes stood as a collateral guaranty.

WHEN THE SECOND MORTGAGE NOTES HELD BY THE BOARD OF TRADE WERE SOLD AND TRANSFERRED BY THE BOARD OF TRADE TO THE L. B. MENEFEE INVESTMENT COMPANY, THIS CONSTITUTED AN ABSOLUTE TRANSFER BY THE BOARD OF TRADE OF THE CREDITORS' CLAIMS COVERED THEREBY.

The above proposition, it seems to us, follows as a matter of course from the fact that the claims were absolutely released in exchange for the notes. Even if this had not been so, the same result would have followed from the principle that, where notes have been given for a debt represented by an open account, a transfer of the notes operates as a matter of law to transfer the debt itself to the transferee. On this point, see Ellison v. Henion, 183 Cal. 171; 190 Pac. 793; 11 A. L. R., 444. In the course of the opinion the court said:

> But, on the other hand, the notes evidence the debt, and if they are transferred the debt is transferred with them, and the original creditor can thereafter maintain no action upon it. It no longer belongs to him. That the original debt for which a note has been taken passes with the transfer of the note was directly decided in Goldman v. Murray, 164 Cal. 419, 129 Pac. 462. There the plaintiff brought an action to recover from the defendant, as a stockholder of a certain corporation, his pro-

portion of a certain indebtedness of the corporation. It appeared that the corporation had been originally indebted for money advanced to it, and gave its note to its creditor for the amount. The creditor then transferred the note to the plaintiff. The trial court found the note to be invalid as against the corporation, because of want of authority for its execution, but found that the original indebtedness of the corporation had been assigned by the original creditor to the plaintiff, and granted a recovery upon it. On appeal, this finding of an assignment was attacked as not supported by the evidence. The only evidence on the point was that the note had been transferred to the plaintiff. It was held that this was enough; that the transfer of the note was in fact a transfer of the original debt as between the original creditor and the plaintiff, although the note was void as to the corporation. If the transfer of a void note be in effect an assignment of the indebtedness which it was intended to evidence, much more must the transfer of a valid note be in effect an assignment of the indebtedness which it does in fact evidence. See also 7 Cyc. 816; Harris v. Johnston, 3 Cranch, 317; 2 L. ed. 452; Looney v. District of Columbia, 113 U. S. 258, 28 L. ed. 974, 5 Sup. Ct. Rep. 463; Davis v. Reilly (1898) 1 Q. B. 1, 66 L. J. Q.B.N.S. 844, 77 L.T.N. S. 399, 46 Week, Rep. 96.

In the present case, there is no question as to the fact of the transfer of the notes taken for the indebtedness of the Woolen Company. They were, as we have said, indorsed and delivered to Pike by the payee, the representative of the Woolen Company's creditors, upon the payment to him of $5,000. The indorsements were special; that is, to the order of Pike. There is no escape from the conclusion that by this transfer the creditors part-

ed, not only with the notes, but with the debts from which the notes were given. In other words, when the plaintiffs brought this action, they were not the owners of or interested in the obligation whose guaranty they seek to enforce in one count, and the stockholder's liability pertaining to which they seek to enforce in the other.

The chop logic by which plaintiff's counsel seek to arrive at the conclusion that payments on the debt were not payments on the debt requires no answer.

Under point V, plaintiff makes the surprising statement that there is no finding by the lower court that sets forth that an amount equal to the total of the notes given to the Board of Trade by the Modoc Lumber Company has been paid.

In the 8th finding it is set forth that the claim of the Macomber-Savidge Lumber Company in the amount of $53,905.92 was assigned to the Board of Trade, and that the total of creditors' claims so assigned was $178,592.77.

In the ninth finding it is set out that notes were made and a mortgage was given to secure this debt. In the fourteenth finding it is definitely set forth that this indebtedness was paid in full. Nothing else can be said of the statement of plaintiff's counsel than that it is simply contrary to the fact. The same must be said of the next statement contained in point V as to there being no allegation in the answer that the consideration alleged in defend-

ant's affirmative defense was the sole consideration. Paragraph VI of the answer, shown on page 31 of the transcript, sets forth what defendant alleges were the consideration for the notes; and paragraph VII, shown on page 33, sets forth that the notes were made * * * "solely on the consideration aforesaid."

From the outset of this case we have insisted, and we still insist, that if the Court were to adopt the theory of the plaintiff in all respects and were to set aside the findings of fact made by the lower court as to what was the consideration for the notes, and were to find that the consideration was just what plaintiff's counsel say in their brief was the consideration, and that instead of giving his notes as collateral security to the debt of his corporation, Goldthwaite really gave notes for $50,000 to Macomber in consideration that Macomber should merely give his individual consent that the Macomber-Savidge Lumber Company might take the action requested by Goldthwaite, we say most confidently, that plaintiff nevertheless could not recover on the notes in any court of justice, for the reason that it would stand out on the face of the transaction that the consideration was wholly illegal. All the facts constituting this defense were pleaded in the answer, as we have pointed out, and it is a defense which does not need to be pleaded, when the facts appear. The law is plain.

A BARGAIN BY AN OFFICER OF A COR-

PORATION FOR A PERSONAL ADVANTAGE IN RETURN FOR ENTERING INTO AN AGREEMENT ON BEHALF OF THE CORPORATION WITH A THIRD PERSON IS INVALID.

II Page on Contracts, Sec. 1025:

> No action can be maintained on a contract by which A agrees to deliver something of value to B for B's personal benefit in order to influence B in his management of X's affairs as X's agent.

II Page on Contracts, Sec. 874:

> A contract by which a corporation conveys its property, and payment therefor is to be made to the stockholders of the vendor corporation, is illegal since it operates as a fraud upon the creditors of the corporation who are thus left without any fund from which their debts are to be paid.

III Williston on Contracts, Sec. 1737:

> A bargain by officer of a corporation for his personal advantage in return for entering into an agreement on behalf of the corporation with a third person, is invalid.

II Elliott on Contracts, Sec. 748:

> Agreements which tend to induce fraud or breach of trust on the part of persons standing in a fiduciary or confidential relation are void. Consequently, contracts the objects or necessary tendency of which place a party who owes a duty or obligations to third persons in a position inconsistent with such duties, are void, even though no breach of trust results.
>
> Sec. 749. Inducing Breach of Trust—Officers of Corporations. Chief among contracts of this character are those which tend to con-

trol the discretion of officers of corporations. Generally speaking, a contract between an officer or director of a corporation and another, which places the officer or director in a position where he is under obligations inconsistent with the duty imposed upon him by reason of his official connection with the corporation, is voidable.

In Peckham v. Lane, 81 Kan., 849, a contract whereby the president of a railroad corporation was to receive a personal benefit for the location of a station at a particular place, was held illegal and void. We quote:

> The invalidity of a contract entered into in violation of this principle does not depend upon whether the trustee has intended an actual wrong or whether any injury has in fact resulted to the beneficiary. The purpose of the rule of law, like that of statutes of a similar nature, is "to spare weak human nature the strain of temptation and to discourage actual fraud by relieving the public from the task, always difficult, and often impossible, of proving it." ***
>
> We need not determine whether the contract here involved, if it had been made by Peckham on behalf of the company, could be enforced by him for its benefit, nor whether he could enforce it on his own account if he could show that he had contracted with the company for the right to do so by a fair agreement, and upon a sufficient consideration, since neither of these conditions is shown by the evidence. The contract on its face appears to be for his personal benefit and to be void for that reason. There is no occasion to presume that he was to take the title in trust for the company. A matter of that importance ought not to be left

for presumption, since the pleader necessarily has knowledge of all the facts and can readily set them out so explicitly as to leave no room for doubt.

McGuffin v. Coyle and Guss, 16 Okla., 648:

> We think that the true principle of law is that a note made payable to an officer of a railroad company in his personal capacity and for his personal benefit, on condition that a road is built on a certain line, to a certain point, by a certain time, is void as against public policy and that no recovery can be had thereon.

In Williams v. Kendrick, 105 Va. 791, the plaintiff and defendant made an agreement with a third person, who was agent for a seller of real property, whereby an option was procured for the purchase and sale of the property of the principal of said agent. It was agreed between the plaintiff and defendant, as partners, and the agent, that the profits arising out of the sale of the property so held under option should be divided one-half to the partnership and one-half to such agent. The property was sold and a profit realized. The agent received his half of the profits and the defendant received the partnership's half of the profits. The plaintiff sought to compel a division of the profits so obtained. It was held that the whole transaction was so tainted with illegality that no recovery could be allowed.

In Landes v. Hart, 131 N. Y. App. Div. 6, the plaintiff sued on a contract to recover $500 which

the defendant agreed to pay him in consideration that he, as director of another corporation, should secure the award of a contract to the defendant. The trial court submitted the case to the jury on the theory that if the plaintiff disclosed his bargain with the defendants to his co-directors before the contract was awarded to the defendants by the directors, he could recover. It was held that this instruction was error, the court saying:

> An agreement which is designed or which in its nature and effect tends to lead persons who are charged with the performance of trusts or duties for the benefit of others, to violate or betray them, is contrary to public policy and cannot be enforced.

In Fletcher on Corporations, we find the following statements of the law:

Section 2272:

> 1. Directors and other officers must exercise the utmost good faith in all transactions touching their duties to the corporation and its properties. * * *
>
> 2. All their acts must be for the benefit of the corporation, and not for their own benefit, except as hereinafter stated (the exceptions not applying to the present case.)
>
> 3. They are not permitted to profit as individuals by virtue of their position.

Section 2310:

> Contracts as contrary to public policy. A contract between an officer of a corporation and a third person is contrary to public policy,

> and therefore illegal and void, where it contemplates a fraud upon the corporation, or where, by giving the officer a secret profit or personal advantage, or otherwise, it places his private interests in conflict with his duty to the corporation. Such a contract, therefore, cannot be enforced by either party, and may be rescinded by the corporation. In any event, this is the rule where the contract is executory. Thus, where a person contracted with a railroad company to construct its road for a certain per cent. of the cost of construction, and thereafter on the same day contracted with five of the seven directors of the road to pay them two-thirds of such per cent, the two contracts are to be treated as pari materia and as constituting one contract which is void as against public policy, and the contractor cannot sue for failure to carry out the contract, under the rule that where an illegal contract is executory neither party can ask the aid of a court to enforce it.

Among the cases cited in support of this doctrine is West v. Camden, 135 U. S. 507, in which the defendant was sued for damages for breach of an agreement he had made with plaintiff that plaintiff should be permanently employed by a certain corporation of which defendant was an officer and majority stockholder. The consideration for the agreement was the conveyance of certain property to the corporation. Notwithstanding that there was no direct private gain to the defendant involved in the transaction, the Supreme Court held the agreement to be void as contrary to public policy, because it **tended to put the defendant in a position where he would not exercise on behalf of**

the corporation his unbiased personal judgment as to its best interests. See the opinion of the court at pages 520 and 521.

The statement of Mr. Fletcher as to the law on this point is sustained by all the following cases which he cites, and which we have examined and found to be directly in point:

Linder v. Carpenter, 62 Ill., 309.
Bester v. Wathen, 60 Ill., 138.
Noel v. Drake, 28 Kan., 265, 42 Am. Rep., 162.
Guernsey v. Cook, 120 Mass., 501.
Wilbur v. Stoepel, 82 Mich., 344, 21 Am. St. Rep., 568.
Lum v. McEwen, 56 Minn., 278.
Attaway v. Third Nat. Bank, 93 Mo., 485.
Koster v. Pain, 41 App. Div., 443, 58 N. Y. Supp. 865.
Donald v. Houghton, 70 N. C., 393.
Kelsey v. New England St. Ry. Co., 62 N. J. Eq., 742.

In Guernsey v. Cook, it was held that a contract by which a shareholder in a corporation, in consideration of the purchase of a part of his stock at a price named, agreed to secure to the purchaser the office of treasurer of the corporation with a fixed salary, and in case of his removal, to repurchase the stock at par, is void as against public policy, and is a fraud on the other members of the corporation, in the absence of evidence that the transaction was not for the private benefit of the

shareholder or that it was consented to by the other members of the corporation. The court said, at page 502:

> It was the purpose and effect of the contract to influence the defendant in a decision affecting the private rights of others by considerations foreign to those rights. The promissee was placed under direct inducement to disregard his duties to other members of the corporation who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interests of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates. In Fuller v. Dame, 18 Pick., 472, a contract was held to be contrary to public policy and to open, upright, and fair dealing, which tended injuriously to affect the interests of the corporations of which the promissee was a member. It was compared to the case of a composition deed where all the creditors release the common debtor upon the payment of a certain percentage, and where stipulation for a separate and distinct advantage is held to be a fraud on other creditors, and void. * * * The objection that the contract is illegal * * * is allowed to prevail * * * for the sake of the public good, and because the court will not lend its aid to enforce an illegal contract.

In Kelsey v. New England St. Ry. Co. the court said:

> The members of the committee, being themselves directors of the company, as well as representatives of the board of directors, occupy a fiduciary position in which they are practically to be regarded as trustees for the stockhold-

> ers as cestuis que trust (citing cases). Acting in this capacity, they were not at liberty to use their power of bargaining for the corporation so as to secure for themselves an exclusive personal benefit. If they did so use their authority, their transaction was voidable against a person unknowingly participating in their abuse of power. (Citing authorities).

In Lum v. McEwen, the latter was superintendent and general manager of the business of a mill company. He had received a promissory note for $5000.00, signed by Lum, in consideration that McEwen would use his influence and authority to secure the removal by the company of its mill to a certain place, and the extension of its logging road to that place. The note had been taken in the name of a third party, one Clark, and it contained the precious words, "For value received." These circumstances did not deter the court from permitting the facts as to consideration and beneficial ownership to be proved. McEwen did advise the company to remove the mill and construct the road, and it did so. It was shown that the receiving of the note had not influenced his action, nor had his recommendation influenced the mill company in the matter. The Supreme Court of Minnesota nevertheless held that the note was void, saying, at page 282:

> That this contract was illegal and void on grounds of public policy will not admit of a moment's doubt. Loyalty to his trust is the first duty which an agent owes to his principal. Reliance upon an agent's integrity, fidelity,

and capacity is the moving consideration in the creation of all agencies; and the law condemns. as repugnant to public policy, everything which tends to destroy that reliance. The agent cannot put himself in such relations that his own personal interests become antagonistic to those of his principal. He will not be allowed to serve two masters without the intelligent consent of both.

Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. In the matter of determining the policy of removing the mill and extending the road, McEwen, in the discharge of his duties, whether merely that of making recommendations, or of exercising authority to act, owed to his principal the exercise of his best judgment and ability, uninfluenced by any antagonistic personal interests of his own. His attempt to secure $5000 to himself was calculated to bias his mind in favor of the policy upon which the payment of the money was conditioned, regardless of the interests of the mill company. It is not material that no actual injury to the company resulted, or that the policy recommended may have been for its best interest. Courts will not inquire into these matters. It is enough to know that the agent in fact placed himself in such relations that he might be tempted by his own interests to disregard those of his principal.

The transaction was nothing more or less than the acceptance by the agent of a bribe to perform his duties in the manner desired by the person who gave the bribe. Such a contract is void.

> This doctrine rests on such plain principles of law, as well as common business honesty, that the citation of authorities is unnecessary. The doctrine is perhaps as clearly and concisely expressed as anywhere in Harrington v. Victoria Graving Dock Co., 3 Q. B. Div. 549. The fact that the validity of such transaction is attempted to be sustained in courts of justice does not speak well for the state of the public conscience on the subject of loyalty to trusts in business affairs.

In the case of Oscanyon v. Arms Co., 103 U. S. 261, the answer contained nothing but a general denial. Nevertheless the court acted on the opening statement of plaintiff's counsel, in which facts were stated disclosing the illegality of the consideration for the contract sued on. This action of the court was alleged as error on the appeal. In passing on the point, the Supreme Court said (p. 266):

> The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worth of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract, shows that in fact no such contract as alleged ever existed. * * *
>
> But if we are mistaken in this view of the system of procedure adopted in New York, and of the defences admissible according to it under a general denial in an action upon a con-

tract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. * * *

The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, ex dolo malo non oritur actio, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.

Plaintiff, as we have remarked several times, owned less than one-fourth of the stock of his Company, and he suffered no injury by the grant-

ing of the concessions made on its behalf, excepting such as the other stockholders suffered, if it should be granted that the arrangement worked an injury rather than a benefit. He was the president and a director of the company. He was engaged in attending to the business connected with the liquidation of his company up to and after the time these notes were given. His attorneys make the startling suggestion that he could not bargain away his corporation's rights, because he had no **authority** to do so. If those rights were what he professed to be bargaining away and he acted without authority, that would leave the notes, on the footing of plaintiff's own declaration as to lack of authority, standing without any consideration whatever. If the court should adopt the contention in the plaintiff's brief, that the consideration was only Macomber's personal consent that his company should, through its trustee, grant the concessions which were asked, plaintiff's position would not be one whit better. It was as illegal for him to bargain away his personal consent while he was an officer and director and a member of a committee of two handling the liquidation of the corporation and advising the trustee in respect thereto, as to bargain away the consent of his corporation itself. His attorneys say he did bargain away his own personal consent under just those circumstances. In such case, the law is strict that not even the appearance of evil will be tolerated.

When it is conceded in the pleadings, and un-

disputed as a fact, that Macomber, at the time he took the notes, was president of his corporation: and when it is deliberately asserted on his behalf by his own counsel to be a fact—which we will concede to them, because they want it conceded—that he was a member of the committee of two which had been appointed by all the stockholders and officers to represent them in the liquidation of the affairs of the corporation and to advise the trustee in respect thereto; and when it is shown that his claim that he had ceased to do business for his corporation is false, and that on the contrary, he was transacting for it all the business it was doing; and when it appears unescapably that he and no one else acted for his corporation in the very transaction out of which the notes arose; and when it appears that the only actual consideration his counsel can even allege on his behalf, to sustain the notes, and the one they do allege, is the granting by him of the concessions which the Macomber-Savidge Lumber Company made respecting its creditor's claim against the Modoc Lumber Company,—then what are the consequences? It needs no argument to reach a conclusion on that point. Plaintiff says the notes are his own, sole, individual notes, in which his corporation has not the slightest interest. If he recovers at all, it must be on the theory he himself has adopted. If the notes were given for his sole personal benefit, and the consideration is what it is demonstrated and admitted to be, the notes are illegal, and that is

the end of the matter. The lower court so found. The fifth conclusion of law made and filed by the court below reads as follaws:

> If the said promissory notes sued on herein were given by the defendant to the plaintiff personally in consideration of any action which the plaintiff took on behalf of the Macomber-Savidge Lumber Company, of which he was the president, said notes are void and uninforcible for illegality of consideration.

The transcript filed in this court includes only the first first four conclusions of law. We have moved to supply the deficiency.

CONCLUSION.

Several things must have become evident to the Court by this time. Those are:

1. That this is one of the most baseless appeals ever taken. Out of the thirteen assignments of error only three are founded on any exceptions. Of those three, the first objection was to a question which was not answered; and all three exceptions are plainly without merit. The case turned entirely on questions of fact. The facts, and the law as well, have been found in favor of the defendant. There was abundant evidence to justify the findings and there are no exceptions thereto.

2. That the case of the plaintiff is not only without merit, but is utterly dishonest in its fun-

damentals. He knows as well as every one else knows that his claim as now made by his counsel that he, the holder of less than a quarter of the stock of an insolvent corporation, was to have $50,000 for merely giving his individual consent that his corporation might if it saw fit enter into the same plan of refinancing which all of the other creditors were joining in, is utterly preposterous and false. It is to be observed moreover that the very things plaintiff's counsel now set up as the basis of the consideration for the notes are things which the defendant has denied under oath in his reply ever happened. The answer explicitly sets up the facts as to the agreement that the claim should be filed with the Board of Trade and reduced to $53,905.92, and the subsequent action by which this arrangement was carried out. The reply absolutely and flatly denies that any such things ever happened. Now the plaintiff pretends that his individual consent to the doing of those things which he has denied under oath were ever done or agreed to be done was the consideration for the notes. He sets up now his consent to the taking of the second mortgage as part of the consideration. He had not only denied in his reply that there was such an agreement, but he had denied on the witness stand that it was even discussed prior to the giving of the notes. See foot of page 123, for instance.

3. If the notes belong to the plaintiff individually and the consideration was what he says it was,

it is then inescapable that the notes were void for illegality of consideration. It is uncontradicted that Goldthwaite wanted to give the notes to the Macomber-Savidge Lumber Company. Plaintiff now asks the Court to find that he was utterly dishonest and false to his trust as president and director and one of the liquidating committee of his corporation, and that when he was offered security for the debt due the corporation, he refused it and insisted on having instead a bribe for himself personally. Such a case does not deserve a moment's favorable consideration.

Respectfully submitted,

VEAZIE & VEAZIE,,

Attorneys for Defendant in Error.